Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council

By resolution of 8 March 1982, the Canadian Judicial Council appointed a Committee of Investigation to evaluate a complaint of *non se bene gesserit* lodged against the Hon. Mr Justice Berger of the Supreme Court of British Columbia. The complaint was prompted by certain comments made publicly by Mr Justice Berger about the constitutional proposals which emerged from the November 1981 accord between the federal government and nine provincial governments.

The Canadian Judicial Council is established under the *Judges Act*, R.S.C. 1970, c. J-1, as am. R.S.C. 1970, c. 16 (2d Supp.) s. 10, and S.C. 1976-77, c. 25, ss 15 and 16. It has the power to appoint a Committee of Investigation under authority granted by s. 40(3). When conducting an investigation, the Committee, under s. 40(4), "shall be deemed to be a superior court".

The Report of the Committee of Investigation and the subsequent Resolution of the Judicial Council were submitted to the Hon. Jean Chrétien, then Minister of Justice, on 31 May 1982 and were made public by him on 4 June 1982. The integral text reprinted here was obtained from the Department of Justice and is published as a case report.

Par résolution du 8 mars 1982, le Conseil canadien de la magistrature désigna un Comité d'enquête aux fins d'évaluer une plainte de *non se bene gesserit* logée contre l'hon. juge Berger, de la *Supreme Court* de Colombie Britannique. La plainte faisait suite à certains propos tenus en public par M. le juge Berger au sujet du compromis constitutionnel conclus entre le gouvernement fédéral et les neufs gouvernements provinciaux au mois de novembre 1981.

Le Conseil de la magistrature fut créé par la *Loi sur les juges*, S.R.C. 1970, c. J-1, telle que modifiée par S.R.C. 1970, c. 16 (2e Supp.), art. 10, et S.C. 1976-77, c. 25, arts 15 et 16. En vertu de l'autorité qui lui est conférée, le Conseil peut former des comités d'enquête (art. 40(3)), et ces comités "sont censés être des cours supérieures" pendant la conduite de leurs enquêtes (art. 40(4)).

Le rapport du Comité d'enquête et la résolution du Conseil qui y fit suite furent présentés le 31 mai 1982 au ministre de la Justice à l'époque, l'hon. Jean Chrétien, qui les rendit publics le 4 juin suivant. Le texte qui suit est une reproduction intégrale du rapport, obtenu du département de la Justice, et est publié en tant que rapport d'arrêt.

* * *

CANADIAN JUDICIAL COUNCIL
CONSEIL CANADIEN DE LA MAGISTRATURE

RESOLUTION

BE IT RESOLVED THAT:

1) The Judicial Council is of the opinion that it was an indiscretion on the part of Mr. Justice Berger to express his views as to matters of a political nature, when such matters were in controversy.

2) While the Judicial Council is of the opinion that Mr. Justice Berger's actions were indiscreet, they constitute no basis for a recommendation that he be removed from office.

3) The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the courts.

IN THE MATTER OF s.40 of the Judges Act;

AND IN THE MATTER OF The Honourable Mr. Justice Berger of the Supreme Court of British Columbia.

REPORT OF THE COMMITTEE OF INVESTIGATION TO THE CANADIAN JUDICIAL COUNCIL

INDEX

IN THE MATTER OF s.40 of the Judges Act;

AND IN THE MATTER OF The Honourable Mr. Justice Berger of the Supreme Court of British Columbia.

REPORT OF THE COMMITTEE OF INVESTIGATION TO THE CANADIAN JUDICIAL COUNCIL

Your Committee was appointed by resolution of the Canadian Judicial Council on March 8, 1982. The resolution reads:

BE IT RESOLVED:

That the Canadian Judicial Council make an investigation under s.40 of the Judges Act into the complaint of the Honourable George Addy, in letters dated November 18th and 19th, 1981, about the conduct of the Honourable Thomas Berger.

That Council designate as the Committee of Investigation the Honourable B.J. MacKinnon, the Honourable James Hugessen and the Honourable W.R. Sinclair with Chief Justice MacKinnon to be the chairman, and direct the Committee to report to the Executive Committee and to the Council.

That the investigation be held in private at such time and place and under such procedures, in conformity with the Judges Act as the Committee may prescribe.

(A copy of the formal resolution is attached as Appendix "A".) [. . ./2]

Documentary Background

The resolution, as it states, arose out of a complaint made to Council by the Honourable George Addy, a judge of the Federal Court of Canada. He wrote a letter to Chief Justice Laskin as Chairman of the Canadian Judicial Council on November 18, 1981 enclosing page 4 of the Ottawa Citizen of November 10, 1981 reporting on statements allegedly made by Mr. Justice Berger. He also stated that the same pronouncements were carried on the C.B.C. TV national news broadcast at 11:00 p.m. on November 10th. The letter of November 18, 1981 from Mr. Justice Addy is attached as Appendix "B" and the newspaper clipping enclosed is attached as Appendix "C".

Mr. Justice Addy was of the view that the opinions expressed by Mr. Justice Berger on a "politically controversial" matter were capable of doing incalculable harm to the independence of the judiciary, the administration of justice and the maintenance of the principle of the separation of powers. He accordingly lodged the complaint of non se bene gesserit.[1]

[1] Quamdiu se bene gesserit As long as he shall behave himself well; during good behaviour; a clause frequently in letters patent or grants of certain offices, to secure them so long as the persons to whom they are granted shall not be guilty of abusing them... Black's Law Dictionary, 4th Ed. The identical definition is found in Earl Jowitt's Dictionary of English Law (1959).

On November 19, 1981, Mr. Justice Addy wrote another letter to Chief Justice Laskin. A copy of that [. . ./3] letter is attached as Appendix "D". Enclosed with that letter was page 7 of the Globe and Mail of November 18, 1981 which contained an article by Mr. Justice Berger. A copy of that page is attached as Appendix "E". Mr. Justice Addy also enclosed an extract from page 9 of the Globe and Mail of the same date to illustrate his point that Justice Berger was intervening in highly controversial and political matters. That extract is attached as Appendix "F".

On November 26, 1981, Mr. Chamberland, the Secretary of the Canadian Judicial Council forwarded the complaint to Justice Berger and to his Chief Justice. Mr. Justice Berger replied to the complaint by letter of December 3, 1981 and enclosed remarks made by him to the annual meeting of the Canadian Bar Association on September 2, 1981. He also enclosed a copy of a partial transcript of the Prime Minister's remarks made in a television interview in Vancouver, as well as a Globe and Mail report of November 12, 1981 of what he had said in a convocation address to the University of Guelph. The letter of December 3rd is attached as Appendix "G", the address to the Canadian Bar Association is attached as Appendix "H", the transcript of the Prime Minister's remarks is attached as Appendix "I" and the report of the convocation address is attached as Appendix "J".

Mr. Justice Berger wrote further to Chief Justice Laskin on March 2, 1982 arguing his position and stating that as the facts were not in issue he did not intend to [. . ./4] participate in the proceedings of the Investigation Committee. That letter is attached as Appendix "K". On March 15th Justice Berger circulated a memorandum to his colleagues of the Supreme Court of British Columbia, a copy of which he forwarded to counsel for the Committee. That memorandum is annexed as Appendix "L".

The final document before the Committee was a memorandum submitted by Chief Justice McEachern in which he raises a question as to Council's jurisdiction to investigate the complaint and, further, whether the complaint relates to a breach of behaviour by Justice Berger in the exercise of his official duties. The submission is attached as Appendix "M".

Proceedings

Your Committee retained J.J. Robinette Q.C. of Toronto as counsel and, on the Committee's instructions, (Justice Berger having been informed of the resolution of Council), he wrote Justice Berger on March 12th advising that the Committee would hear his representations with respect to Justice Addy's complaint in Vancouver on Saturday, March 27th. The Committee also advised Justice Berger, through counsel, that if he preferred to have the

hearing in Edmonton we would hear his representation there on March 27th. A [. . ./5] copy of Mr. Robinette's letter is attached as Appendix "N". Justice Berger replied on March 16th, enclosing a copy of his letter of March 2nd to Chief Justice Laskin and his memorandum of March 15th and stated that he did not intend to be present at any hearing. His reply is attached as Appendix "O".

Mr. Robinette also wrote to Mr. Justice Addy advising him of the proposed hearing date of March 27th. He declined to appear.

The facts are not in dispute and the position Justice Berger takes is clear. The members of the Committee, accordingly, felt it was in order for them to consider the issues raised and make this report after considerable correspondence, numerous telephone communications and meetings.

The Issues

(1) Does the Judicial Council have the power to investigate the extra-judicial conduct of a judge without his consent?

(2) Must there first be a prima facie case for removal and nothing less before a formal investigation takes place? [. . ./6]

(3) Is there power in the Judicial Council to reprimand or impose some lesser penalty than to recommend the removal of the judge about whom the complaint has been made?

(4) Does the conduct of Justice Berger in the instant case warrant the recommendation of any action by the Judicial Council?

Conclusions

It is the fourth question that has been given to the Committee to assess. In view of the obvious time and consideration given to the earlier questions by Chief Justice McEachern, we decided to secure an opinion from Mr. Robinette for the benefit of both the Committee and of the Council. The opinion is annexed as Appendix "P".

Section 40(2) of the Judges Act states:

> (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior, district or county court.

Section 40(3) allows Council to appoint members to such an investigation committee and after the investigation is complete it is Council that reports its conclusions. [. . ./7]

We do not think that the reference to procedures in England is apposite in this connection as s.40 and s.41 of the Act give statutory authority to the Judicial Council to investigate "any complaint" by means of an inquiry or investigation and report its conclusions. We are of the view that the Judicial Council has the power to investigate what is described by Chief Justice McEachern as extra-judicial conduct, with or without the consent of the judge concerned, and there does not have to be a "prima facie" case for removal established to the satisfaction of every member before an investigation takes place. Indeed the full facts of a case may not be known or understood until an investigation has taken place.

In light of the conclusion of this Report we do not have to deal with the third question.

We turn now to the final question we have to face, which we shall discuss under headings, albeit briefly when one considers the voluminous material on the separation of powers and the struggle for judicial independence.

Independence of the Judiciary

The doctrine of the separation of powers and the notion of judicial independence was not achieved without a [. . ./8] long, arduous struggle that was only completed in England by the late 18th century. There is now general agreement in common law countries that appointed judges should not intermeddle in politics while on the bench, and we do not believe that Justice Berger disagrees with that general principle. The more difficult problem is to establish where the line should be drawn in any particular case.

The historian, W.S. Holdsworth described the nature of the position of the judiciary as follows:

> . . . [T]he Judiciary forms one of the three great divisions into which the power of the State is divided. The Judiciary has separate and autonomous powers as truly as the King and Parliament, and in the exercise of those powers, its members are no longer in the position of servants of the King or Parliament in the exercise of their powers. . . The judges have power of this nature because, being interested with the maintenancy and supremacy of the law, they are and always have been regarded as a separate and independent part of the constitution. It is true that this view of the law was contested by the Stuart Kings but the result of the Great Rebellion and the Revolution was to affirm it. (Holdsworth, His Majesty's Judges (1932) 173 Law Times 336 at pp. 336-337).

[. . ./9] There are many passages from eminent legal scholars which might be quoted to similar effect. However, the principle that emerges from legal history is that the political and judicial spheres of action must remain clearly separate and apart if the fundamental premise of parliamentary democracy is not to be violated.

Chief Justice McEachern makes reference to Sir Edward Coke. It must be remembered that the lengthy conflict between James I and Sir Edward Coke was over the King's assertion of the right to intervene in court proceedings. Coke was not seeking to intermeddle in political matters. His dismissal from office was due finally to his refusal to submit to Royal intervention in the case of Commendams and his removal foreshadowed a long series of removals of judges from the bench for purely political reasons. (A.F. Havighurst, The Judiciary and Politics in the Reign of Charles II (1950) 66 L.Q. Rev. 62).

Not only the Crown but Parliament was equally active in seeking to exercise political control over the bench. It was not unusual for the Commons or the King to approach the judiciary in an attempt to persuade them as to the "proper course" on a matter they were hearing or about to hear. The Commons on occasion sought to impeach judges who had given judgment contrary to their views. (W.J. Jones, Politics and the Bench (1971)). It was not until [. . ./10] the Act of Settlement of 1701 that tenure "during good behaviour" was guaranteed by statute. This statute, the forerunner of all others in this regard, not only provided security of tenure but it also stipulated that removal could only be made upon the address of both houses of Parliament.

The principle of the independence of the judiciary came somewhat later in Canada, and its evolution has been fully canvassed by Professor W.R. Lederman in his important article "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769. Professor Lederman provides many early examples in this country of judges who were involved in partisan political activity.

McArthur in Canada and Its Provinces, Vol. IV 762-63 describes the pre-1843 position of the judiciary as follows:

> It was with great difficulty that the connection between the judges and executive and legislative councils could be broken. . . the assembly directed its energies securing control over the funds from which the salaries of judges were paid, in order that by withholding their salaries they might exercise an independent recall. The only choice of the judiciary seemed to be between dependence on one or other political party.
>
> In recommending responsible government Lord Durham suggested in his famous Report "the independence of judges should be secured by giving them the same tenure of office and security of income as exists in England."

[. . ./11] With the implementation of the Report, no justice was allowed to sit or vote in the Executive Council, Legislative Council or assemblies of Upper and Lower Canada. The judges were now restricted to and protected in the exercise of their judicial duties. In a dispatch of April 30, 1839 implementing representations coming from the Nova Scotia Assembly, the Colonial Secretary, Lord Glenelg, said in part:

> The principle to be steadily borne in mind and practically observed is, that all the Judges, including the Chief Justice, should be entirely withdrawn from political discussions and

> from all participation in the measures of the local government, or of any persons who may be acting in opposition to it.
> (W.L. Lederman, The Independence of the Judiciary (1956) 34 Can. Bar Rev. p. 1155)

The separation of judges from politics in this country is now clear and distinct and is a foundation stone of their independence. To bring the matter up to date we quote from Lord Justice Devlin's Chorley Lecture, delivered at the London School of Economics in 1975 and reproduced in 39 Modern Law Review 1 under the title "Judges and Lawmakers": [. . ./12]

> What is the function of the judge? Professor Jaffe has a phrase for it - 'the disinterested application of known law.' He would put it perhaps as the minimal function. I should rank it as greater than that. It is at any rate what 90 per cent or more of English judges - and I daresay also of all judges of all nationalities - are engaged in for 90 per cent of their working lives. The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two.
> (p. 2) (Emphasis added.)

Chief Justice McEachern in his submission to the Committee quotes Shimon Shetreet, Judges on Trial at pp. 88-89, and suggests that "except for criminal conviction no other acts outside the line of duty form grounds for removal from office held during good behaviour". At pp. 93-94 of the same publication, Professor Shetreet writes:

> The fact that this interpretation gives an unqualified power of removal to Parliament should not give rise to difficulties. The problem should be examined in the historical context of the struggle between Parliament and the Crown. Bearing in mind that Parliament came out of the constitutional struggle as the winner, it was only natural to assert full control over the judges... Likewise, after the establishment of tenure during good behaviour a power of removal, which is not subject to the technical condition of good behaviour [. . ./13] was necessary. Before the Act of Settlement when judges held office at pleasure, the Crown could remove them for improper behavior, or physical or mental inability, which although not amounting to a breach of the good behavior condition nor to a criminal act was a justifiable cause of removal from office. The Act [of Settlement] established a tenure during good behavior and stripped them of this power; thus a gap was created whether neither Parliament by impeachment nor the Crown by scire facias or criminal information could remove a judge who fell within this gap... [accordingly]...[i]n order to fill the gap an additional method of removal by address was established, which made it possible for Parliament to remove a judge for improper behavior or inability who otherwise, after the tenure during good behavior had been established, could not have been removed.

Professor Shetreet emphasizes that "...[t]he prevailing view among legal scholars is that the address was established as an addition to the methods of removal existing prior to the Act and that in exercising the power of removal by address, Parliament is not limited to consideration of 'good

behaviour' in its technical sense." (p.93) Professor Lederman also agrees that "...the Parliamentary concept of misconduct is potentially wider and more various than that the Court of Queen's Bench would take notice of under Common Law." (Lederman, p.787).

In any event, in s.41(2) Parliament has given some guidelines to the Canadian Judicial Council in the discharge [.../14] of its obligations under ss.40 and 41. There are no precedents in Canada involving the censure of a judge for political activities and presumably such activities would have to be considered under s.41(2)(d) of the Judges Act - "(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of his office". Whether political activity would under certain circumstances fall within the word "misconduct" under s. 41(2)(b) is another consideration.

Professor Shetreet wrote (op cit p. 284):

> As the grounds for removal and discipline do not admit of precise statement, and the decisions would inevitably depend on the circumstances of the case, ultimate responsibility for providing answers...lies mainly with those persons or body who exercise disciplinary power over judges.

However, the precedents and common sense establish that a case of serious misconduct must be clearly made out before there should be any recommendation for removal.

It is important that public confidence in the judiciary and in its impartiality should not be impaired. Sir William Anson was of the view that Parliament could extend the term "good behaviour" to cover "any form of misconduct which would destroy public confidence in the holder of the office". (Anson, Law and Custom of the [.../15] Constitution, 3rd ed., p. 222).

In England judges have been censured by Parliament for engaging in partisan political acitivities. Professor Shetreet cites Prime Minister Campbell-Bannerman's discussion of Grantham's case in the House where the Prime Minister said:

> ...the judicial bench of this country, and it is one of the great blessings we enjoy, has the confidence and support of the whole community...[but] when a judge steps down into the lower sphere... to make little partisan speeches, he is open to criticism as any man in the street. If we think any judge by such conduct is lowering the dignity of the Bench...it is our duty to express our reprobation of such conduct.
>
> (Shetreet, op cit, p.277)

Sir Hartley Shawcross, in a debate on the removal of a magistrate in 1950 for outspoken criticism of an Act of Parliament, suggested that:

> ...[c]riticism of the policy of Parliament is a matter for politicians, for the public and the Press but for those who accept the responsibility of discharging judicial functions to use the bench as a platform for criticism...would very quickly destroy the reputation for impartiality which the bench in this country enjoys...
>
> (Shetreet, p. 315)

[. . ./16] Lord Denning, while suggesting that judges may comment when Parliament's policy has unforeseen results, or is not working out in practice as anticipated, nevertheless is clear that the judiciary "must never comment in disparaging terms on the policy of Parliament". It would be, he wrote, "inconsistent with the confidence and respect which should subsist between Parliament and the judges" (Denning, The Changing Law (1953)).

The examples that Chief Justice McEachern cites are cases of English judges speaking publicly on the right of an accused to remain silent and the need for a Bill of Rights. These were statements of a general nature and were not critical of the policy of parliament [*sic*] embodied in a politically controversial bill. Further, the situation in England is somewhat different as the law lords sit in the House of Lords and are entitled to speak on political matters although they seldom do. Chief Justice McEachern mentions Lord Scarman's reference to the Charter of Rights in the House of Lords and asks if comments on the Canadian Constitution are permissible for English judges but prohibited for Canadian judges. Lord Scarman is a member of a political assembly and he was speaking in that assembly and the answer has to be "yes" that Lord Scarman is in a different position because, quite apart from having the right to speak in the House of Lords, he was speaking on a constitution that he [. . ./17] would never be called on to interpret.

Arguments based on the English system must always be viewed with caution. It is a different system from ours although both have the same roots. For example, the Lord Chancellor, in one of his incarnations, is a politician and leader of the government in the House of Lords and in that aspect is the exception to the rule that judges do not engage in political controversy. There is no equivalent to this position in Canada.

The history of the long struggle for separation of powers and the independence of the judiciary, not only establishes that the judges must be free from political interference, but that politicians must be free from judicial intermeddling in political activities. This carries with it the important and necessary concomitant result - public confidence in the impartiality of judges - both in fact and in appearance.

With this brief recital of history and reasons for judicial independence we return to the allegations made against Justice Berger and his defence.

The Complaint and the Defence

From the material annexed it can be seen that Mr. Justice Berger intervened in a matter of serious political [. . ./18] concern and division when that division or controversy was at its height. His office and his experience as a Royal Commissioner, (appointments made because of his office and his

competence), obviously made his comments newsworthy. He described the decision of the first ministers to "abandon" native rights to be "mean-spirited and unbelievable". In his article he criticized the loss of Quebec's veto and argued for one amending formula in preference to another. He again attacked the first ministers for "repudiating" native rights and argued for the restoration of s.34 "for the recognition and confirmation of aboriginal and treaty rights of Indians, Inuit and Metis".

Justice Berger, while agreeing that what he did may be unconventional, argues that the issues he discussed transcended partisan politics. Because the resolution of the issues in his opinion bore directly on how we were to be governed for the next 100 years, he felt obliged to speak out publicly. He refers to the late Mr. Justice Thorson and Chief Justice Freedman speaking on public issues. We do not have the facts with relation to those matters and are not in a position to comment on them.

Justice Berger also notes that no complaint was made to the Judicial Council about his address to the Canadian Bar Association. It is true that it appears that [. . ./19] judges, in speaking to legal bodies, are accorded somewhat greater leeway in expressing their views than they are in speaking to the general public. However, it should be noted that a great part of the address seems to be a thoughtful philosophical discussion of the nature of Canada and its parts and the importance of its preservation. It may be, on reflection, that some of the statements made in this address, although not of as strident a nature as the material complained of, were inappropriate for a judge. It may also be that because he was speaking to an audience of lawyers and judges, the media and others took no notice of his remarks.

Justice Berger's views, which he eloquently defends in his letter to Chief Justice Laskin, are not in issue. What is in issue is his use of his office as a platform from which to express those views publicly on a matter of great political sensitivity. It is possible that other members of the judiciary held opposing views, as obviously elected representatives did, with equal conviction. Justice Berger makes reference to the Honourable Mr. Martland's statements with regard to the Charter of Rights after he retired from the bench. The analogy is not a helpful one except to underline the principle that judges do not speak out on political issues while holding office. Mr. Martland at the time he gave his interview was no longer a judge. His franchise had been restored and there was no longer any possibility that he would be called on to determine issues [. . ./20] as an impartial judge. In our view, Justice Berger completely misses the mark when he says "does it make all the difference that nothing was said until he (Mr. Martland) retired?" It makes the greatest of difference. Politically controversial statements by a citizen who is no longer a judge and who can never again be called on to be a judge, do not destroy the necessary public confidence in the impartiality of judges.

Not only must judges be impartial, the appearance of impartiality, as Lord Devlin pointed out, must be maintained for the fair and proper administration of justice. If a judge feels compelled by his conscience to enter the political arena, he has, of course, the option of removing himself from office. By doing so, he is no longer in a position to abuse that office by using it as a political platform. One would not have expected Justice Berger's views to have been given the media attention they were given if he had not been a judge but merely a politician expressing his views in opposition to other politicians.

Judges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem. It can be argued that the separation of powers is even more emphatic here than in England. In England, High Court judges have the right to [. . ./21] vote. Here, federally appointed judges are denied the right to vote in federal elections and in a number of provinces they have been deprived by statute of a right to vote in provincial elections, and in some cases, even in municipal elections.

It is apparent that some of the native peoples are unhappy with s.35 of the Canadian Charter of Rights and Freedoms. If Justice Berger should be called on to interpret that section, for example, the meaning to be given to the word "existing" in the phrase "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", would the general public have confidence now in his impartiality? After Justice Berger spoke publicly on the necessity for Quebec retaining a veto, his brother judges in Quebec were called on to determine whether such a right existed.

Conclusion

In our view it was unwise and inappropriate for Justice Berger to embroil himself in a matter of great political controversy in the manner and at the time he did. We are prepared to accept that he had the best interests of Canada in mind when he spoke, but a judge's conscience is not an acceptable excuse for contravening a fundamental rule so important to the existence of a parliamentary democracy [. . ./22] and judicial independence. To say that not all judges are cast in the same mold, as does Justice Berger, is only to state the obvious. On every great matter of political concern it would be probable that judges would hold opposing views privately and, if Justice Berger's view is acceptable, it would be possible to have judges speaking out in conflict one with the other because they hold those opposing views from a sense of deep conviction.

We say again if a judge becomes so moved by conscience to speak out on a matter of great importance, on which there are opposing and conflicting

political views, then he should not speak with the trappings and from the platform of a judge but rather resign and enter the arena where he, and not the judiciary, becomes not only the exponent of those views but also the target of those who oppose them.

This is not a question, as Mr. Justice Berger suggests, which each judge must decide for himself. That question has been answered for him from the moment he accepts the Queen's Patent as a judge.

So far as the material before us reveals Justice Berger's impropriety has been an isolated instance. Chief Justice McEachern also advised us in his Submission that [. . ./23] Justice Berger had disengaged himself from the constitutional debate as soon as the Chief Justice spoke to him. Nevertheless we view his conduct seriously and are of the view that it would support a recommendation for removal from office. There are, however, in addition to those already noted, special circumstances which make this case unique. As far as we are aware, this is the first time this issue has arisen for determination in Canada. It is certainly the first time the Council has been called on to deal with it. It is possible that Justice Berger, and other judges too, have been under a misapprehension as to the nature of the constraints imposed upon judges. That should not be so in the future. We do not, however, think it would be fair to set standards ex post facto to support a recommendation for removal in this case.

The judicial office is one which confers important privileges, obligations and protections necessary to the carrying out of the duties of one of Her Majesty's judges. A judge must accept the duty to protect that office, his fellow judges and the public from political controversy as the best way of maintaining "the historic personal independence" of judges.

We conclude that the complaint non se bene gesserit is well founded but, for the reasons stated, we do not make [. . ./24] a recommendation that Justice Berger be removed from office.

[signature]
The Honourable B.J. MacKinnon
(Chairman)

[signature]
The Honourable J.K. Hugessen
(Member)

[signature]
The Honourable W.R. Sinclair
(Member)

* * * * *

Note

Chief Justice McEachern speaks of the "full weight of the judicial establishment coming down on (Justice Berger) - possibly destroying his career..." The Committee wishes to emphasize that all their correspondence, telephone conversations and meetings were conducted on a private and confidential basis. No member of this Committee publicized the resolution of the Judicial Council or the workings of the Committee. The information as to the existence of the Committee and its composition apparently came out of British Columbia and Justice Berger saw fit to make a statement to the press on the complaint made against him. The C.B.C. in [. . ./25] Vancouver called the Chairman of the Committee and the Counsel to the Committee, aware of the composition of the Committee and the name of its Counsel. Needless to say the calls were not answered. We wish to repeat that at no stage of the proceedings did any member of the Committee publicize any aspect of their studies, they having no wish to impose a greater burden on the judge investigated by public revelation of the fact that an investigation was proceeding.

APPENDIX "A"

[Letterhead of Canadian Judicial Council]

BE IT RESOLVED:

That the Canadian Judicial Council make an investigation under s. 40 of the *Judges Act* into the complaint of the Honourable George Addy, in letters dated November 18th and 19th, 1981, about the conduct of the Honourable Thomas Berger.

That Council designate as the Committee of Investigation the Honourable B.J. MacKinnon, the Honourable James Hugessen and the Honourable W.R. Sinclair with Chief Justice MacKinnon to be the chairman, and direct the Committee to report to the Executive Committee and to the Council.

That the investigation be held in private at such time and place and under such procedures, in conformity with the *Judges Act* as the Committee may prescribe.

Moved by Chief Justice G. Evans, Vice-chairman.
Seconded by Chief Justice J. Deschênes.

Carried.

Ottawa, March 8th, 1982
[signature — Pierre Chamberland]
The Secretary

APPENDIX "B"

[Letterhead of Federal Court of Canada]

Judge's Chambers
The Honourable Mr. Justice Addy

CONFIDENTIAL November 18, 1981

The Right Honourable Bora Laskin
Chief Justice of Canada
Chairman of Canadian Judicial Council
Supreme Court of Canada
Wellington Street
OTTAWA, Canada
K1A 0H9

Dear Chief Justice Laskin:

For consideration and whatever action the Canadian Judicial Council might deem appropriate, I am enclosing herewith page 4 of the Ottawa Citizen dated the 10th of November, 1981, reporting on statements allegedly made by Mr. Justice Berger. The same pronouncements were also carried that night on the CBC TV national news broadcast at 11:00 P.M.

In the context of the concensus recently arrived at following many years of political posturing, wrangling and manoeuvring, it is difficult for me to conceive of a subject which, at the present time, is more politically controversial or divisive. The harm which pronouncements of this kind in such circumstances is capable of creating to the independence of the judiciary, the administration of justice and the maintenance of the principle of separation of powers is, in my view, incalculable. Had a minister of the Crown uttered statements of this nature concerning the actions of a judge or of a court while a matter was sub judice, one would expect him to be found guilty of contempt of court, and, in all probability, to be obliged to resign because of popular indignation.

This is not the first time that Mr. Justice Berger has ventured far beyond what I, at least, consider to be the bounds of propriety and the limits of proper judicial restraint in political matters of this kind and has used his Commission [. . ./2] as a justice of the Supreme Court of British Columbia to make highly controversial political pronouncements which are published from one end of Canada to the other and which, were it not for that Commission and for other high profile tasks which he was granted as a result of his appointment, would not have warranted publication in the neighborhood newsletter.

You may rest assured, Chief Justice Laskin, that it is not without considerable hesitation or without being personally convinced of the gravity of the situation, that I finally decided to lodge this formal complaint of non se bene gesserit against a brother judge. I wish to emphasize also that my action in lodging this complaint is not to be taken as an indication that I disagree in any way with the ideas expressed by Mr. Justice Berger.

Yours truly,
[signature — Mr Justice Addy]

Enclosure

APPENDIX "C"

[Clipping from Ottawa Citizen (10 November 1981) 4]

Berger blasts 'mean-spirited' ministers

By Bert Hill
Citizen staff writer

Justice Tom Berger said Monday the decision of all Canadian first ministers to abandon native rights as one of the prices for agreement on the constitution was "mean-spirited and unbelievable."

The B.C. Supreme Court justice also said the compromise provincial override clauses on major parts of the charter of rights is a cause for grave concern in the light of the treatment of minorities by all Canadian governments.

Berger was head of the royal commission on the MacKenzie Valley pipeline, which heard the concerns of native people about industrial development in the North.

"Last week our leaders felt it was in the national interest to sacrifice the rights because they felt they were serving the greater good in reaching an agreement."

"It was mean-spirited. There are a million and more natives in Canada: Indians, Inuit and Metis and for the most part they are poor and powerless. They were the people who were sacrificed in this deal.

"That is the whole point of minority rights, that they should not be taken away for any reason."

Berger said "I can still hardly believe that it has happened. We have had 10 years of increasing consciousness of native rights and land claims."

"It has had an impact on many people but not on Canadian statesmen. It passed right by them."

Berger said the blame lies with all first ministers including René Lévesque since he did not point to the denial of native rights as a reason for his refusal to sign the agreement.

Berger said Canadians, concerned about the protection of unpopular minorities, can take little comfort from the fact that the federal government insisted on a five-year renewal of every action to override the fundamental, legal and equality rights in the charter of rights.

Berger said the problem is always "the first time when an inflamed majority wants to strike at a defenceless minority not five years later when it is irrelevant."

Berger was in Ottawa to promote a new book, *Fragile Freedoms, Human Rights and Dissent in Canada.*

Berger's book traces the actions that governments at all levels have taken against minorities from the expulsion of the Acadians and the denial of minority language rights in New Brunswick, Manitoba and Ontario to the internment of Japanese-Canadians and the denial of civil liberties during the 1970 War Measures crisis.

APPENDIX "D"

[Letterhead of Federal Court of Canada]

Judge's Chamber OTTAWA, K1A OH9

The Honourable Mr. Justice G.A. Addy

CONFIDENTIAL November 19th, 1981

The Right Honourable Bora Laskin
Chief Justice of Canada
Chairman of Canadian Judicial Council
Supreme Court of Canada
Wellington Street
OTTAWA, Canada
K1A 0H9

Dear Chief Justice Laskin:

Further to my letter of the 18th of November, concerning Mr. Justice Berger, you will find enclosed herewith page 7 of the Globe and Mail of that date. I only purchased the paper in Montreal during the evening after having written to you in the afternoon, and I am forwarding the article in question to you in case it might have escaped your attention. It must have been written by Mr. Justice Berger when he came East quite recently to promote the sale of his book.

You will also find enclosed a copy of a news item from page 9 of the same newspaper which clearly illustrates the extent to which the statements made in the article are both immediately controversial and highly political.

It appears to me that Mr. Justice Berger has not the faintest idea of the position and role of a judge in the British parliamentary system to-day. On the other hand, if he has, then he is guilty of misconduct which, in my view at least, would tend to cause far greater harm to the administration of justice than sleeping with a prostitute or driving whilst impaired. [. . ./2]

I wish to emphasize that my complaint is not based on any divergence of views on the substance of the article. On the contrary, I feel that the views expressed therein are quite logical and acceptable and are also very relevant to the serious political problems currently facing our country.

Yours truly,
[signature — Mr Justice Addy]

Enclosures

APPENDIX "E"

[Clipping from The [Toronto] Globe and Mail (18 November 1981) 7]

Steps that'll give Canada a fairer form of constitution

BY THOMAS BERGER

Mr. Berger, a B.C. Supreme Court Justice, produced the MacKenzie Valley Pipeline Report and is the author of Fragile Freedoms.

THE TWO great issues not resolved in the constitutional agreement between Prime Minister Pierre Trudeau and the premiers are the place of Quebec within Confederation and native rights.

Dealing with Quebec: we have been told that Mr. Trudeau, Jean Chretien and their colleagues speak for Quebec and we can ignore Premier René Lévesque's objections to the agreement. Of course Mr. Trudeau and Mr. Chretien represent Quebec: but above all they represent the national interest. If we are entitled to disagree with Mr. Lévesque on the ground that the Liberals in the House of Commons speak for Quebec, why does not the same apply to the other provinces? Should the objections of the premiers of the English-speaking provinces be ignored when they do not coincide with those of MPs elected from those provinces? Surely not.

It is said that the Parti Québecois is not a party like the others: it is committed to independence for Quebec. Does this mean it has no right to have

its views taken seriously? It may not achieve independence, but it will be a force in Quebec politics for many years. We cannot wash our hands of Quebec and leave it to Mr. Trudeau and Mr. Chretien to sort out any differences there may be with Mr. Lévesque (as the nine English-speaking premiers did on minority language education rights).

We are told that Mr. Lévesque was betrayed by Mr. Trudeau and the nine English-speaking premiers. Others tell us he outsmarted himself. After all, in 1977 he agreed to reciprocal entrenchment of minority language education rights. Then, in April, 1981, he agreed to surrender Quebec's historic veto. So he has brought it all on himself, but this is not the point.

We should make up our minds on the basis of principle. Do we accept the principle of duality in Canada? If we do, then the application of this principle calls for the reciprocal implementation of minority language education rights. It also requires the restoration of Quebec's veto.

Canada consists of two great societies, joined together by history and circumstance. The central issue for our history has been the working out of relations between these two societies. The dominant theme of constitutional discussions in 1867 was the accommodation of the two great language communities. This theme, though at times it has receded, overshadows the crisis today.

History shows it is minority language education rights that lie at the heart of the matter. If the principle of duality — if the idea of Canadian citizenship in a federal state — is to be meaningful, French and English language minorities should be guaranteed the right under the Constitution to schools where their children can be educated in their parents' language. Canadians moving from province to province should have the right to send their children to schools where they will be taught in their parents' language.

It is one thing to hold Mr. Lévesque to his agreement on minority language education rights, another to hold him to the loss of Quebec's veto. He shouldn't have surrendered the veto. The Parliament of Canada is, and will always be, predominantly English-speaking. Parliament has a veto. The National Assembly is, and will always be, predominantly French-speaking. It is the only government in North America in which francophones are a majority. Representing as it does the heartland of French Canada, it should have a veto. This is essential if we accept the principle of duality. The genius of Mr. Trudeau's formula (really the Victoria formula) was that it distributed the veto on a regional basis, enabling Quebec to retain its veto, but not on the basis of special status.

Will the nine English-speaking premiers balk at the restoration of Mr. Trudeau's amending formula? No doubt. But I urge them to consider that it is

not all that different from their own formula (the Vancouver formula). They have said that under their formula there are no second-class provinces. This is an unhappy phrase. Because if it is apt, there are still, under the premiers' formula, two classes of provinces. Under the Trudeau formula, Quebec and Ontario had a veto; under the premiers' formula the two together still have a veto, for no amendment, even with the support of seven provinces, can carry if it is not backed by provinces with 50 per cent of the Canada's [*sic*] population. The dreaded combination of Central Canada can still forestall the West and the Atlantic provinces. In other respects the Trudeau formula offered greater influence to the West than the premiers' formula does. Three provinces in the West (or in the Atlantic region) could exercise a veto under the Trudeau formula; under the premiers' formula it takes all four.

Mr. Trudeau's formula does not allow for provinces to opt out of future amendments. Abandoning opting out will facilitate the formulation of national policy and the development of national programs on a co-operative basis. As well, abandonment of opting out will obviate the difficult question of fiscal compensation. Finally, if the Trudeau formula is restored, it ought to be without the possibility of resort to a referendum in a constitutional impasse.

It will be said that this is all a waste of time, because Mr. Lévesque will never accept it. Maybe so, but it will be fairer to Quebec than the agreement of Nov. 5. I don't know whether the Prime Minister and the premiers ganged up on Mr. Lévesque, but the amending formula they agreed upon makes it possible for English-speaking Canada to gang up on Quebec in future. To forestall this, Quebec's veto over future constitutional changes must be restored.

As for native rights: the agreement reached in January this year by all parties in the House, to entrench aboriginal rights and treaty rights in the new Constitution, has been repudiated. No one would expect that a Constitution drawn up by the provinces would affirm aboriginal rights and treaty rights. For instance, in British Columbia, under every administration since Confederation the Government has refused to acknowledge aboriginal rights. Native peoples have always looked to the federal Government as the champion of their interests.

Now the federal Government has joined the provinces in repudiating native rights. This is wrong.

If the new Constitution and the Charter acknowledge the claims of the two founding peoples, then how can they refuse to acknowledge the place of the native people?

It is true the Prime Minister and the premiers have promised to hold another conference to discuss native rights, but the amending formula allow-

ing provinces to opt out will then be in effect. The right of the provinces to opt out will make it almost impossible to reach a meaningful amendment defining native rights and applying throughout Canada. Native rights, if they are defined, will be defined on a constitutional checkerboard basis. The conference ought still to be held. But only after the restoration and entrenchment of the provision (Section 34) for recognition and confirmation of aboriginal and treaty rights of Indians, Inuit and Metis.

I make one suggestion. Given provincial opposition, and given that the settlement of native claims is a historic duty of the national government, consideration might be given to a provision for the federal Government to compensate the provinces wherever provincial lands are, by agreement or otherwise, transferred to native peoples.

It would be unrealistic to expect the premiers to relinquish the principal concession they won from Mr. Trudeau, the provincial override on fundamental freedoms, legal rights and equality rights in the Charter. I think these rights should have been entrenched for they should be beyond the reach of legislative majorities. But this is a philosophical question on which reasonable men and women can differ. It is not a question, like that of Quebec or native rights, which undermines the essential fairness of the constitutional agreement.

So two steps are called for: restoration of Quebec's veto and restoration and entrenchment of Section 34, but with a provision, if necessary, for federal compensation to the provinces.

These are not concessions to Mr. Trudeau. They will not enhance the power of the federal Government. They represent the means, however, of enabling all Canadians to join in celebrating this moment of renewal.

APPENDIX "F"

[Clipping from The [Toronto] Globe and Mail (18 November 1981) 9]

Trudeau's 'sale price' offer gets cold shoulder from Levesque

BY MARGOT GIBB-CLARK
Globe and Mail Reporter

QUEBEC — Premier Rene Levesque said yesterday he would refuse to negotiate the compromise constitutional offer made by Prime Minister Pierre Trudeau during his weekend visit here.

In an angry exchange with Liberal Opposition Leader Claude Ryan during question period in the National Assembly, Mr. Levesque said Mr. Trudeau's "sale price" suggestions were really only those of Mr. Ryan. They denied the legitimacy of the Assembly, he said.

He accused Mr. Ryan of letting the federal Liberals act as the real opposition in Quebec and said "We, in any case, intend to stand up as a government. We will not allow Quebec's rights to be limited without our consent."

But he did not completely close the door, saying "this can be discussed but not the way we are trying to do it now."

Mr. Levesque was speaking before the news came in Ottawa last night that the federal constitutional proposal might be further modified. An aide said he would have no comment until later today.

In his speech to a Liberal convention Mr. Trudeau offered:

— To limit access to Quebec's English schools to children of parents who received their primary education in English in Canada;

— To allow the province some control over manpower mobility if significant numbers of anglophones were to move to Quebec;

— To provide fiscal compensation if Quebec were to opt out of programs affecting culture or language in, for example, education.

Mr. Levesque wants talks to proceed on the basis of a motion to be discussed later this week in the Assembly. It calls for recognition of two equal founding peoples in Canada, maintaining Quebec's right to veto over constitutional amendments or providing total financial compensation and limiting the charter of rights to fundamental freedoms and democratic rights and official bilingualism in federal institutions and services.

When Mr. Ryan asked whether he would consider negotiating the issue of the language of schooling by itself, the Premier said there was no question of this.

"We won't undertake any piecemeal negotiation, Mr. Member from Argenteuil. We won't undertake any negotiation which could unravel our already insufficient powers. . . ."

Mr. Ryan took a dig at Mr. Levesque for trading away Quebec's traditional constitutional veto last spring and said he had called unspecified other premiers to check up on Mr. Levesque's bargaining stance.

"I asked among other things if the Premier of Quebec had defended Quebec's right of veto at the conference last spring. Nobody knew anything about it."

Mr. Levesque gave up the veto in exchange for opting out with compensation at an April 16 meeting of the eight provinces then disagreeing with Ottawa.

APPENDIX "G"

[Letterhead of The Hon. Mr Justice T.R. Berger]

CONFIDENTIAL 3rd December, 1981.

The Honourable Chief Justice Bora Laskin,
C/o Canadian Judicial Council,
130 Albert Street,
OTTAWA, Ontario, K1A 0W8.

Dear Chief Justice,

I understand that you and your colleagues on the Judicial Council are concerned by my intervention in the constitutional debate. I spoke at Guelph University on November 10th. The following week the Globe and Mail published an article of mine on the constitutional accord of November 5th. I enclose copies of both the speech and the article. The Prime Minister has accused me of making a foray into politics.

What I have done may be unconventional. But it was not a venture into politics in any ordinary sense. It is not as if I had discussed the ordinary stuff of political debate - inflation, interest rates, the budget, or the nationalization of the Asbestos Corporation. The issues which I discussed transcended partisan politics. In fact, when the vote on the constitutional resolution was taken this week, there were dissenting votes by members of all parties in the House.

This was, after all, a moment of constitutional renewal, unique in our country's history. The First Ministers (except Premier Lévesque) had signed a constitutional accord. I felt a sense of great dismay about the accord. My remarks were directed not to the Prime Minister or any one of the premiers, nor to any political party, but to our leaders collectively.

While these are questions that rise above narrow partisanship, they are nevertheless political questions in the broad sense. Indeed, they bear directly on the question of how we are to be governed for the next 100 years. It was for this reason that I felt obliged to speak out publicly.

What I did is not without precedent. Mr. Justice Thorson used to participate in the campaign for nuclear disarmament. Chief Justice Freedman went on television in October, 1970, to declare his support for the invoking of the War Measures Act. On the occasion of his visit to Vancouver to open the new [. . ./2] Court House in September, 1979, Lord Denning told us that the trade unions in England were a threat to the freedom of that country. No doubt each of these judges felt compelled to speak out. It may be said that it would undermine the independence of the judiciary if judges were constantly engaged in such activity. But they are not. These interventions by judges are infrequent, even rare.

I enclose a copy of the Prime Minister's remarks made here in B.C. He taxes me for not supporting him at an earlier stage of the debate (he had also done this at a press conference a week earlier) and then goes on to urge that my conduct has been offensive. In fact, I did support his Charter before he abandoned it. I enclose a speech I made to the annual meeting of the Canadian Bar Association in Vancouver in September, to an audience of 1,000 or more lawyers and judges, presenting the case for the Charter. (I remind you that Lord Scarman is one of the leading figures in England who has publicly urged the adoption of a Charter of Rights in that country). I was, I am afraid, outspoken. Yet none of the lawyers, judges or politicians there present complained. I do not understand why what was opportune before November 5th became "inopportune" after November 5th. The views I expressed had not changed (though couched, perhaps, in more forceful language after November 5th).

What I did was done after considering carefully what I should do, and with the best interests of my country in mind. I do not believe that anything I have done has impaired the independence of the judiciary.

The Prime Minister has, with respect to my intervention, urged the judges to "do something about it". I believe it is a mistake to think it is possible to place fences around a judge's conscience. These are matters that no tidy scheme of rules and regulations can encompass, for all judges are not cast from the same mould.

Mr. Justice Addy's letters have arrived. I do not think anything that he has said calls for a reply beyond what I have already written in this letter. It is a question of principle. Should the Judicial Council issue edicts on matters of conscience? If you and your colleagues agree with Mr. Addy, there is nothing more to be said. I believe, however, that these are matters that individual judges must decide for themselves.

Yours sincerely,
[signature — Mr Justice Berger]

cc: The Hon. Chief Justice McEachern

APPENDIX "H"

INTO A NEW CANADA

Remarks by
The Honourable Mr. Justice Thomas R. Berger
of the Supreme Court of British Columbia.

At the
63rd ANNUAL MEETING OF THE CANADIAN BAR ASSOCIATION

Hotel Vancouver,
Vancouver, B.C.
Wednesday, September 2nd, 1981.

I favour the patriation of the new Constitution and the Charter of Rights which is an essential part of it (assuming that the Supreme Court of Canada upholds the constitutional propriety of the process by which this is proposed to be done).

But, it is said, is not the Constitution essentially flawed by the fact that it is not the product of consensus between the federal government and the provinces? Even if the Supreme Court of Canada sanctions the procedure, the new Constitution will be adopted by resolution of Parliament; there will be no concurrent resolutions of all of the provinces or even of a majority of the provinces. The provinces, except for Ontario and New Brunswick, are opposed. The new Consttitution [*sic*] and the Charter will become the supreme law of the land, binding on the provinces as well as Parliament, but without the concurrence of the provinces.

Unilateral patriation does not, however, set a precedent, because the new Constitution provides that it can be amended only by Parliament and a certain number of provinces, or by referendum. There will be no further unilateral amendments. [. . ./2] Given that a consensus with the provinces could not be achieved, it is difficult to argue that the federal government, having submitted a resolution to Parliament, should not have proceeded on its own. (The word "patriation" is, except in the technical sense, a misnomer. I wish the word had never been used. In reality, the B.N.A. Act is being repatriated. It is - it has always been - a Canadian document. It was drafted by the Fathers of Confederation at Charlottetown, Quebec and London in the 1860s. It was enacted by the United Kingdom Parliament at Westminster because that was the only way in which the British colonies in North America could be brought together in a federal union. Now Westminster has been asked to repatriate the B.N.A. Act to its one [*sic*] and future home.)

As for the amending formula, it is weighted according to population. This means that Quebec and Ontario each have a veto. So does the West, and so do the Atlantic provinces. I do not see how it could be otherwise: does anyone suggest that every province should have a veto? Or that no province should have a veto? In any event, a veto can be overcome by a referendum vote. But, it is said, this means that the federal government can win every referendum by choosing the right question to ask. Hardly. The Quebec Government spent four years trying to think of a question to ask Quebecers that would yield the answer it wanted; in the end it failed. The electorate will perceive the true issue to be determined. Is a vote on a constitutional [. . ./3] amendment inconsistent with the federalist idea? I do not think so. The inventors of federalism, the Founding Fathers of the United States of America, included such a provision in the Constitution of the United States. In an imperfect world, these provisions will do.

Has the federal Government's persistence divided the country, as many who reject the Constitution and the Charter, allege? We have had twelve months and more of contention since the Trudeau proposals were introduced in September, 1980. Quebec, it is said, will never accept the Constitution and the Charter; neither will the western provinces.

Quebec voted for federalism a year ago; I find it difficult to believe they will reject it because the Constitution is being brought home. Has the West been alienated? Well, in a sense it has always been alienated; there is a Western tradition of protest. There has always been tension between Ottawa and some of the provinces. There have been advocates of separation from time to time, and not only in Quebec. In 1878, as the result of federal delay in building the promised railway to the Pacific coast, a resolution to withdraw from Confederation was passed by the B.C. Legislature. The resolution was "mislaid" in Ottawa by the Mackenzie administration. Before the year was out, however, John A. Macdonald had been re-elected, and renewed efforts to build the railway were undertaken. [. . ./4]

I think the Western protest movements of the 1920s and 1930s were far more significant indicators of Western alienation than the cries of pain that we hear today. There is not a complete understanding of the historical context in which the West was opened up. The West was not a part of Canada in 1867. John A. Macdonald, the architect of Confederation, sought to extend the new nation he had built across the prairies and over the Rockies to the Pacific. It was natural that he would arrange for tariffs to channel trade between the East and the West. Should we have expected him to channel it North and South, when his whole object was to join the West to Canada so that it would not be annexed to the United States? Manufacturing is still concentrated in the East today, because that is where the markets are.

There have, however, been compensations for the West. How many Westerners are aware that the "Crow" rate is not some ghastly plot by Central Canada, but rather a subsidy for the transportation of prairie wheat to the Lakehead - a subsidy paid for since 1897 by all Canadians. Similarly, the enormous federal subsidies to the oil and gas industry are, in effect, subsidies to Western industries. The great expansion of many Western enterprises, such as Dome Petroleum, are attributable in no small part to federal subsidies. I do not quarrel with this: federal subsidies to the transportation and resource sectors of the economy are time-honoured Canadian policy. My point is that, since the days of the construction of the CPR [. . ./5] they have brought - and are still bringing - economic benefits to the West.*

So what difference will the new Constitution and Charter make? The federal government will continue as our national government. What about the provinces? They are powerful today; some of them have enormous revenues and resources. They will still possess them under the new Constitution. Indeed, their control over resource revenues will be augmented. This will be to the advantage of the resource-rich provinces while, at the same time, equalization - the means by which the poorer provinces are sustained - will be entrenched in the Constitution. So why is there so much controversy? It is arguable that the debate over the Constitution and the Charter has become the channel for the expression of provincial grievances over a range of other issues.

Then there is the Charter itself. Will it be effective? Will it produce a flood of useless litigation? Will court dockets be filled with these cases? Not likely. We have, in the Canadian Bill of Rights, enacted in 1960, a kind of half-way house. It has given us standards for due process to which lawyers have appealed now for 20 years. And litigation generally has greatly expanded as new fields of legal endeavour and concepts such as native rights and environmental rights have developed, and class actions, enlarged notions of standing, and so on, have been urged [. . ./6] upon the courts with greater success than in previous generations.

But, putting all of these matters to one side, the constitutional debate, I suggest, has had its uses. It is important that we reflect on the idea of Canada. The question we must ask is, why do we believe in Canada? What are the things that are most important in our shared history? Why is Canada worth preserving in the 1980s? Here we are, in the 114th year of Confederation,

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* The Alaska Highway gas pipeline, if it is built, will be built by Nova, a dynamic Alberta company (formerly Alberta Gas Trunk Line), as a result of a federal decision-making process. The Alaska Highway route, and Nova, were preferred to the MacKenzie Valley route which was proposed by Arctic Gas, a consortium with headquarters in Toronto.

twenty-four million souls scattered among the snow and scenery. Canada has persisted. Why? And why should it matter?

Some believe that the Canadian achievement lies in the utilization of our natural resources - the establishment of the fishery, the gathering of fur, the development of the grain trade, the building of an empire in timber, and now the exploitation of oil and gas and minerals on our frontiers and beyond. Here lies the Canadian achievement, in the conquest of our cold and distant landscapes and seascapes. These common tasks, it is said, are what unite us all.

But isn't there more to it than that? Isn't there a Canadian intellectual contribution to the legal and political order, a product of the encounter of the English and the French in North America, yet distinctive because it represents something essentially Canadian? [. . ./7]

We are two distinct societies - two nations, if you will. It would be a mistake to pretend otherwise. Yet we are mixed up together, and we have chosen to stay together. There are a million or more Native people in our midst, claiming a measure of self-determination. And millions of new Canadians, immigrants of every ethnic and racial background, and every political and religious persuasion. Thus diversity is in a sense the essence of the Canadian experience. And the Constitution and the Charter reflect this diversity.

It will be said that this leaves us with a constitutional hodge-podge: protection for languages here, over there guarantees for aboriginal peoples, and, as well, an affirmation of multiculturalism. No, these represent the logical outcome of our history. Our two languages, English and French, represent the two great European civilizations that established the Canadian polity. Under the new Constitution both English and French will be official languages in some of the provinces; minority language educational rights will be entrenched in all of the provinces and territories. The Native peoples, who were here before the French or the English, are assured of a special status, and their aboriginal rights are recognized under the Constitution. But the designation of two official languages and the entrenchment of minority language educational rights, and the special place of the aboriginal peoples - none of these are to stand in the way of immigrants continuing to use their own languages and adhering to their own [. . ./8] customs as a matter of private choice. It is provided that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Whatever their race, national or ethnic origin, colour or religion, Canadians are to be equal under the law and entitled to the equal protection of the law.

I think that these things are of the first importance. Canada can, perhaps, develop ways whereby men and women of different races, religions, languages and cultures can live together. Woodrow Wilson's ideal of the ethnically defined nation-state has proved impossible of achievement: even Great Britain and France are now contending with the questions with which the presence of minorities confronts them. If Quebec were to achieve independence, she would at once be faced with the very questions that confront Canadians: the rights of a great linguistic minority, the claims of the aboriginal peoples, and the place of numerous ethnic and racial groups in the life of the country.

I believe in the uses of democratic institutions. Representative government, due process, trial by jury, free trade unions - all of these are the means to the dispersal of political and economic power. All of these, it seems to me, will be strengthened by the new Constitution and Charter. As for the provinces, their reach over resources and revenue appears to have been extended by the Constitution, while at the same time they retain all the powers they previously held under Section 91 [*sic*] of the B.N.A. Act. They will have the legal tools [. . ./9] to execute the political will of the people in each province. Of that I have no doubt.

There will, however, be curbs placed on provincial powers (and, equally, on federal power). These will be in respect of language rights and fundamental freedoms. This is the point where the views of opponents of the Charter in Quebec and the West converge. They reject the idea that language rights should be entrenched, and they see the provinces as the appropriate guardians of fundamental freedoms. It seems to me this question is basic. If we cannot agree on entrenchment of Franchophone rights in the English-speaking provinces and of Anglophone rights in Quebec, then it seems to me there is no commonality of views about the fundamental values that should undergird Canadian federalism. Similarly, with fundamental freedoms: if Canadians are not to enjoy freedom of conscience, of speech, of religion, of association and assembly, as the necessary incidents of citizenship in the Canadian state, if the social contract between citizens of Canada and the federal state to which they owe allegiance does not include express provisions for the safeguarding of fundamental freedoms throughout Canada, common to citizens in every province and enforceable equally in every province, then what is the point of our remaining together, what is the common bond - what are the common values - that hold us together? [. . ./10]

These are questions of philosophical approach to the Constitution and the Charter. Reasonable men may stand on one side or the other; it depends on their concepts of Canadian federalism. But then there is the argument that the Constitution and the Charter are not important anyway. It is said by some that fundamental freedoms depend on the private ownership of property. Others

have a quite different point of view; they say that the mode of production determines all questions of power and class, that written constitutions are virtually meaningless, and that political freedom exists only for those wielding economic power.

There is something in both of these points of view. Widespread ownership of property is essential to freedom as we know it in the liberal democracies. Properly understood, this principle does not constitute an argument against restraints upon private economic power, for the concentration of property, profit, and power in private hands is inimical to liberal democracy. But neither does freedom necessarily follow from the ownership of the means of production by the State. We have seen that the concentration of power in the hands of a government that is not accountable through free elections to its citizens means that those who exercise power in such a regime are the fiercest opponents of liberal democracy. [. . ./11]

So democratic institutions, the rule of law, and due process do count. When all is said and done, it is not a question of economic arrangements alone. The achievement and the strength of the Western nations, indeed, their right to call for the judgment of history, lies in our willingness to examine and re-examine the assumptions by which we live, and in our openness to the winds that bring new ideas. The spirit of free speech and free inquiry in politics, religion, science and the arts informs our ideal of democracy; it depends on the affirmation and reaffirmation of our conviction in the virtues of diversity and the right of dissent. The Constitution and the Charter affirm these principles.

Confrontations between the institutions of the state and its minorities and dissenters reveal the true face of Canadian democracy. All of us are conscious, in one way or another, of limitations to our freedom, even at its furthest periphery, and we may feel inhibited by them. Who can tell when the periphery will cease to be the periphery? When does a limitation of freedom cut into the blood and bone of a free society? In matters related to civil liberty, an attack on the periphery is as serious as an attack on the heartland. F.R. Scott has said, "No citizen's right can be greater than that of the least protected group". It is, I believe, the obligation of every citizen to see that the rights of the least protected groups are given the same protection that he, himself, enjoys. [. . ./12]

I do not want to be misunderstood: diversity is not - and dissent is not - coextensive with provincial rights. Too often, we have seen one province or another insisting upon conformity to some prevailing orthodoxy. When, in the 1890s, schools were taken away from French Canadians in Manitoba, it was by the province. In 1912, it was the Province of Ontario that passed Regulation 17 to limit the use of French in the Franco-Ontarians' separate

schools. In the late 1930s, it was the Province of Alberta that passed legislation to limit freedom of the press. When, in the 1940s, Japanese Canadians were removed from their homes on the Pacific coast and interned, the Province of British Columbia, far from trying to protect its citizens, led the attacks against them. It was the Province of Alberta that passed legislation to restrict the sale of land to Hutterites in 1944 (and, it should be said, that repealed the legislation in 1972). When, in 1969, the federal Government proposed to sever the constitutional link between Ottawa and the Native peoples, the federal government found that the Native peoples had no wish to be left to the exclusive jurisdiction of the provinces. For this reason, under existing constitutional arrangements, the Native peoples of the North oppose provincial status for Yukon Territory and the Northwest Territories. In 1970, when the federal government invoked the War Measures Act, it was the provincial authorities in Quebec that immediately imprisoned some 400 or more of its citizens as political dissenters. In the 1970s it has been the province of Quebec [. . ./13] that has tried to deny English-speaking Canadians migrating to that province the right to educate their children in their own language (but which, it should be added, has never tried to deny English-speaking Canadians already resident in the province the right to their own schools or to limit the use of English in such schools).

The Charter of Rights offers persons who are under attack by the majority a place to stand, ground to defend, and the means for others to help them. Many have said that the entrenchment of these rights, placing them beyond the reach of Parliament and the provinces, will enhance the power of the courts. And, of course, it does precisely that. In a federal state the courts interpret the provisions of the Constitution that divide legislative power. Why should they not also have the task of interpreting the nature and scope of the rights that belong to the people and lie beyond the reach of legislative authority?

If the rights of minorities and dissenters are to be entrenched, if there are to be limits on the powers of both Parliament and the provinces, the judges will always have the last word on where these limits are. Judges may not always be wiser than the politicians, but they should be able to stand more firmly against the angry winds blowing in the streets; at any rate they should have no reason to take the bellows to them.

Of course, the entrenchment of minority rights will limit the power of Parliament and of the provinces. This is the whole point! These rights should never be subjected to the will of the majority. They are minority rights. It will be said [. . ./14] that the working out of these limits will entail years of controversy and litigation. That is true. But these same issues would generate years of controversy and litigation whether human rights and fundamental

freedoms were entrenched or not. My point is that, with their rights entrenched, minorities and dissenters can continue their struggle on a surer footing.

A strong nation can nurture diversity; a strong nation can abide dissent. Perhaps the French-Canadian presence will not survive in Anglophone strongholds, but it will be a diminished Canada that denies French-Canadian minorities the opportunity to survive, indeed to flourish. The voice of dissent in Canada may be stopped, but it will be a fearful and irresolute people who do it. We may reject the claims of the Native peoples, but if we do we shall be turning our backs against the truth of our own beginnings as a nation.

The Charter will not by itself altogether protect us from a federal government determined to invoke the War Measures Act in circumstances that do not call for it; or from a province which has lost its nerve in the midst of a stampede by the public and the press to harass some defenceless minority. These things may still be done pursuant to the saving clause found at the beginning of the Charter.

Neither does the Charter resolve the great questions of human rights and fundamental freedoms that are raised. In a sense these are never resolved. They will continue to be the [. . ./15] subject of inquiry, debate and controversy. This will be a disappointment to those who crave certainty in these matters, who wish for a small world in which no one challenges prevailing certitudes, or prefer to adopt a Marxian formula which reveals the necessary outcome of present disorder.

Thus the Charter will not be immutable. It may be that further safeguards for diversity and dissent may be entrenched in the Constitution and the Charter in years to come. Some minorities wish to assimilate, some to remain distinct. How can both aspirations be accommodated? Nor, indeed, will present institutions themselves be immutable. What constitutional arrangements will, for instance, best suit the aspirations of the Acadians, or of Canada's Northern peoples, the Dene and the Inuit?

We should not forget that insight into our condition may spring from any quarter. The free marketplace of ideas is the source of our stability and strength - it provides assurance for those who are trying to discern the future, or to alter the shape of the present - sometimes haltingly, sometimes in language that threatens or dismays - that their voices will not be stifled.

Canadians are the heirs of two great European civilizations. The Charter acknowledges our legacy from England of Parliamentary institutions and the common law, and it reflects the egalitarian ideals and the notions of the rights of man derived from France. Can we not build on these foundations of [. . ./16] freedom a nation in which the place of minorities and the rights of dissenters are secure? For, if you look around the world, you will see that these are the great issues of our time.

This great exercise in Constitution-making should enable us to know ourselves; to discover who we are and what we may become; to realize the advantages of diversity and dissent. This is what the Canadian experience is all about: to see if people who are different can live together and work together; to regard diversity not with suspicion, but as a cause for celebration; to enshrine Wilfrid Laurier's idea of a regime of tolerance in the life of the nation.

APPENDIX "I"

[Partial transcript of the Prime Minister's remarks made in a television interview in Vancouver, 24 November 1981]

WEBSTER: ONE OF THE PRIMARY CRITICS OF REMOVAL OF SECTION 34 WAS MR. JUSTICE THOMAS BERGER OF THE SUPREME COURT OF B.C. DO YOU THINK HE WILL BE HAPPY NOW THAT "34" IS IN WITH EXISTING RIGHTS IN IT?

TRUDEAU: WELL, JACK, THAT'S A PRETTY SENSITIVE SUBJECT. I'M NOT SURE WHAT PERMITTED JUSTICE BERGER TO ENTER THE PUBLIC DEBATE ON A RESOLUTION WHICH IS BEFORE PARLIAMENT.
THE JUDGES ARE VERY SENSITIVE WHEN POLITICIANS CRITICIZE THEM. I THINK IT'S NOT THE PURPOSE OF A JUDGE TO GET IN AND DISCUSS AN ACCORD THAT WAS REACHED, OR A BILL BEFORE PARLIAMENT AND I TAKE STRONG EXCEPTION TO THAT. I HOPE IF HE HAD WANTED TO DO THIS I WONDER WHY HE DIDN'T SUPPORT THE BILL WHEN IT WAS THERE, AND WHEN IT GAVE QUEBEC THE VETO AND GAVE THE INDIANS ABORIGINAL RIGHTS. HE DIDN'T SUPPORT US THEN.
HE SAW FIT TO GET OFF THE BENCH AND ENTER INTO THE POLITICAL ARENA AT A VERY INOPPORTUNE TIME.
I JUST REGARD THIS AS THE JUDICIARY GETTING MIXED INTO POLITICS AND I HOPE THE JUDGES WILL DO SOMETHING ABOUT IT.

APPENDIX "J"

[Clipping from The [Toronto] Globe and Mail (12 November 1981) 8]

The first Canadians are last

Mr. Justice Thomas Berger speaking at the University of Guelph:

The agreement reached in February this year by all parties in the House of Commons, to entrench aboriginal rights and treaty rights in the new Constitution, has been repudiated by the Prime Minister and the premiers.

In fact, they were unanimous on this question. The Prime Minister and all the premiers were in agreement — not only the nine premiers of the English-speaking provinces, but Premier Levesque, too, for the reasons he gave for his refusal to sign the constitutional agreement did not include any reference to native rights. There was, at the end, not one of our Canadian statesmen willing to take a stand for the rights of the Indians, the Inuit and the Metis.

No one would expect that a Constitution drawn up by the provinces would affirm aboriginal rights and treaty rights... Now the federal Government has, in order to obtain a constitutional agreement, surrendered on the issue of native rights. I confess that I never did believe they would...

Why were native rights affirmed in February and rejected in November? I think it is because the native peoples lie beyond the narrow political world of the Prime Minister and the premiers, a world bounded by advisers, memoranda, non obstante clauses and photostat machines. It is, in fact, in our relations with the peoples from whom we took this land that we can discover the truth about ourselves and the society we have built. Do our brave words about the Third World carry conviction when we will not take a stand for the peoples of our own domestic Third World? How can anyone believe us when we say that we wish to see poverty eradicated in native communities, an end to enforced dependence and a fair settlement of native claims?

The constitutional agreement is a defeat for the native peoples but it is also a defeat for all Canadians. The agreement reveals the true limits of the Canadian conscience and the Canadian imagination. For the statesmen who signed the agreement of Nov. 5, 1981, represent us. They know us well, and they believed they could, with impunity, delete native rights from the Constitution.

It is true that the Prime Minister and the premiers have promised to hold another conference to discuss native rights. But, of course, then the urgency

will be gone, and in any event the opting-out formula in the new Constitution — the right of the provinces to opt out and the threat to opt out — will make it impossible to reach a meaningful amendment defining native rights and applying throughout Canada. Native rights will be defined according to the constitutional checkerboard that Canadian statesmen have given us.

In the end, no matter what ideology they profess, our leaders share one firm conviction: that native rights should not be inviolable; the power of the state must encompass them. Their treatment of native peoples reveals how essential it is to entrench minority rights, without qualification.

No words can disguise what has happened. The first Canadians — a million people and more — have had their answer from Canada's statesmen: they cannot look to any of our governments to defend the idea that they are entitled to a distinct and contemporary place in Canadian life. Under the new Constitution the first Canadians shall be last.

This is not the end of the story. The native peoples have not come this far to turn back now. But it is an abject and mean-spirited chapter. No one can rejoice that it was written in Canada.

APPENDIX "K"

[Letterhead of The Hon. Mr Justice T.R. Berger]

CONFIDENTIAL 2nd March, 1982.

The Honourable Chief Justice Bora Laskin,
C/o Canadian Judicial Council,
130 Albert Street,
OTTAWA, Ontario, K1A 0W8.

Dear Chief Justice Laskin,

I have been advised that the executive committee has recommended to the Judicial Council that an Inquiry Committee be established to consider my intervention in the constitutional debate.

I took the view - and still do - that it was wrong to deny Quebec a veto on future constitutional amendments. However the question may be viewed as a matter of law and convention, the rejection of Quebec's historic veto is a repudiation of the idea of two founding peoples. If one of those peoples, the

French Canadians, in the only legislature where they are in the majority, does not have the power to forestall the adoption of measures calculated to diminish the rights of French Canadians within Quebec or outside Quebec, including rights won under the new Charter, that is a repudiation of the idea of the duality of Canada.

The question of native rights is even more profound, for the dominant society, whether its language and culture is Anglophone or Francophone, impinges everywhere on native peoples. I objected to the deletion, in the accord of November 5th, 1981, of the recognition that had been promised for aboriginal rights and treaty rights. The question of the scope and extent of such rights remains to be negotiated by native peoples and our governments, or, perhaps, in certain instances, to be determined by the courts. But to have refused to recognize in our new Constitution that native peoples have such rights - whatever their scope and extent may be - would have shamed all Canadians. In fact, the Prime Minister and the premiers did restore native rights to the Constitution, though in a qualified fashion. My intervention may have helped to persuade them to do so.

These issues are political in the broadest sense, but they transcend the daily round of partisan politics - interest rates, inflation, unemployment, and so on. They are questions of fundamental fairness. They are the [. . ./2] foundations of Canada's claim that it is a plural democracy. The rights of all of our cultural and ethnic minorities may be at risk if we fail to acknowledge the rights of Canada's founding peoples and its native peoples. To suggest that a judge has no right to speak out on these issues, at a moment of constitutional renewal unique in our history, is to reduce the great issues of Canadian history to arid protocol.

I repeat what I said in my earlier letter: what I did is not without precedent. Mr. Justice Thorson used to participate in the campaign for nuclear disarmament. Chief Justice Freedman went on television in October, 1970, to declare his support for the invoking of the War Measures Act. On the occasion of his visit to Vancouver to open the new Court House in September, 1979, Lord Denning told us that the trade unions in England were a threat to the freedom of that country. No doubt each of these judges felt compelled to speak out. It may be said that it would undermine the independence of the judiciary if judges were constantly engaged in such activity. But they are not. These interventions by judges are infrequent, even rare.

What I said may, to some, be thought of as justifying my removal from office. Indeed, Mr. Justice Addy has urged that my offence is greater than that of a judge who has slept with a prostitute or who has been guilty of driving whilst impaired. I should have thought that such a proposition needed only to be stated to be dismissed. It may be, however, that you and your colleagues agree with him. If you do, you must say so.

Has anything I said diminished public confidence in the judiciary? During my ten years as a judge I have conducted royal commissions for Liberal, Conservative and New Democratic governments. These have entailed the making of recommendations that have been the subject of political controversy. Yet there has never in all that time been a complaint to the Judicial Council from a member of the public - not even by an unsuccessful litigant - that I have not properly discharged the duties of my office. Nor have there, as far as I know, been any complaints to the Council by members of the public since November, 1981, when I intervened in the constitutional debate. Has there, in fact, been a complaint to the Judicial Council by any person except Mr. Justice Addy? Has the Prime Minister, notwithstanding his admonition to the judges "to do something about [my intervention]" made a complaint to the Council? Has the Minister of Justice directed the Council to establish an Inquiry Committee, as he has the power to do? I think not. [. . ./3]

This is a vast country, and those who are appointed to the judiciary do not all hold the same view as you and your colleagues of the limits that judges should observe. Those limits are largely self-imposed. The Council does not have a roving commission to supervise Canada's judges, or to make gratuitous observations on their conduct. I do not dispute that, in a given case, a judge's public statements may constitute grounds for his removal from office. In such a case a complaint to the Judicial Council may lead to a recommendation for his removal. If the Judicial Council believes, like Mr. Justice Addy, that I should be removed from the bench, they should say so. If not, the complaint should be dismissed.

There can be no difficulty in establishing the facts in my case. I have placed the evidence before you. To establish an Inquiry Committee in these circumstances is unnecessary. I do not intend, therefore, to participate in such an Inquiry Committee.

Yours truly,
[no signature]

cc: The Hon. Chief Justice McEachern

APPENDIX "L"

[Letterhead of The Hon. Mr Justice T.R. Berger]

MEMORANDUM

15th March, 1982

Dear Colleagues,

As Chief Justice McEachern has told you, the Canadian Judicial Council has passed a resolution that an inquiry committee be established to consider my intervention in the constitutional debate in November, 1981, (Chief Justice Nemetz and Chief Justice McEachern dissented).

I am attaching a copy of a letter, setting out my position, that I sent to Chief Justice Laskin on March 2nd, 1982.

This is a miserable business, but its ramifications may be important: if a member of this court had spoken out against the internment of the Japanese Canadians in 1942, or against their deportation in 1946, would that have been regarded as misconduct? Earlier, in 1927, when tbe federal government enacted legislation making it an offence to raise money to bring proceedings in furtherance of aboriginal claims, would it have been misconduct for a judge to let it be known that he thought this was unjust? Last year I agreed that my name could be used as one of the signatories to an open letter that was published in the Vancouver Sun, addressed to President Brezhnev, deploring Soviet repression of Jewish dissidents. Was this a venture into politics liable to condemnation by the Judicial Council? If a judge were to say in public that he was opposed to the imposition of martial law in Poland, notwithstanding that the Government of Canada apparently takes a different view, would this be misconduct? Would such activities bring the judiciary into disrepute? I doubt it.

The public knows that judges hold strong views, but that they do their best to ensure that they do not determine the content of their judgments. Occasionally judges feel that, as a matter of conscience, they must give expression to those views. Mr. Justice Martland, within a few days of his retirement from the Supreme Court of Canada, gave an interview to the Globe and Mail denouncing the whole idea of a Charter of Rights. Is it not a fair inference that he has for some time held this view, though he never said so before? Does it make all the difference that nothing was said until his retirement? To say that it does is an attempt at dissimulation that deceives no one. [. . ./2]

There is another consideration: when I decided to intervene in the constitutional debate, it was only after I had concluded that what I had to say

might be heeded. I believe that my speech at Guelph University and my piece in the Globe and Mail were influential in some measure in bringing about the restoration of aboriginal rights and treaty rights to the Constitution. Should a judge remain silent when, by speaking out, he may actually help to prevent a grave injustice to a minority? I do not think it is any alternative to say that he should try to make his influence felt behind the scenes, as Mr. Justice Brandeis of the Supreme Court of the United States apparently used to do.

In my view, the Judicial Council has no mandate to pass judgment on these questions unless a judge's public statements in a given case constitute grounds for his removal from office. Otherwise, the staff of the Council would have to monitor the public speeches of well-known figures such as Laskin, C.J., Deschênes, C.J., and Estey, J., as well as lesser figures like me, watching for passages to be brought to the Council's attention. This would be absurd.

The Prime Minister urged the judges "to do something about [my intervention in the constitutional debate]". It may be that the Judicial Council has in mind to censure me in some fashion, without seeking to have me removed from office. But judges cannot be placed on probation. We are not employees of Eaton's who can be reprimanded, the reprimand placed in our file, continuing in office on sufferance. To concede such a jurisdiction to the Judicial Council - a jurisdiction Parliament has not conferred - would truly impair the independence of the judiciary. The Judicial Council has no power except to recommend that a judge be removed from office. No disciplinary powers are conferred on the Council itself. This is as it should be. No condemnation of a judge should take place unless there is sufficient cause for his removal from the bench. If there is no such cause, his integrity should not be called in question. Matters of lesser concern are for each Chief Justice to deal with in his own court.

It may be that some will say "Yes, a judge may speak out, but if he does he must be ready to give up his seat on the bench, for it is intolerable that he should intervene in public debate on these questions, even though they are questions of human rights and fundamental freedoms". Chief Justice Laskin and his colleagues, however, show no disposition to consider this issue. Instead, they are holding meetings, passing resolutions, and setting up an inquiry as if this were a case of an alleged breach of the Criminal Code or disorderly sexual activity in which the facts are in dispute and require to be ascertained. I have no intention of participating in such an exercise. [. . ./3]

I intend to continue to sit, as Chief Justice McEachern has urged me to do. If the Judicial Council recommends that I be removed from office, I will, of course, ask to be taken off the rota.

[no signature]
T.R.B., J.

TO: THE MEMBERS OF THE SUPREME COURT OF BRITISH COLUMBIA.

APPENDIX "M"

[Letterhead of The Hon. Allan McEachern]

March 29, 1982

The Honourable B.J. MacKinnon
Associate Chief Justice of Ontario
Osgoode Hall
Toronto, Ontario
M5H 2N5

Dear Sir:

Re: The Honourable Thomas R. Berger

The circumstances of this matter are so important to the Judiciary that I feel compelled to restate my respectful opinion, supported now by some authorities, that your investigation should proceed with the utmost caution.

The Canadian Judicial Council has appointed your Committee to investigate the complaint of "non se bene gesserit" made by the Honourable Mr. Justice Addy against the Honourable Mr. Justice Berger. As you know, I regard this as an unfortunate decision, but, the decision having been made, my purpose now is merely to assist you in arriving at a correct recommendation. What I am about to say is merely for your consideration.

There are two principal questions:

(1) the disposition of this most serious complaint against Berger, J.; and [. . ./2]

(2) the independence of judges. In this respect I do not refer to the institutional independence of the Judiciary in its continuing dialogue with government, but rather the equally important independence of individual judges from, in this case, an assertion by the Canadian

> Judicial Council that it has a general superintendence over the conduct of judges, including the right to discipline them for matters not arising from the discharge of their duties.

In this latter connection I perceive an assumption on the part of a majority of Council that such a jurisdiction exists. For reasons which will be mentioned later, I question the validity of this assumption.

I shall deal with the specific complaint against Berger, J. first.

History

May I begin with some trite history.

For many centuries prior to the Act of Settlement in 1701, judges were not independent. The judges of the Court of King's Bench held their offices during the King's pleasure, and other judges, whose commissions were quam diu se bene [. . ./3] gesserit (during good behaviour), were subject to executive control by the often-used Royal prerogative of suspension.

The proudest moment in the history of the Judiciary, in my view, was the refusal of Lord Justice Coke, C.J. in 1616 to decide the Case of Commendams as directed by the King. But it must be remembered that this courageous triumph was short-lived, for Coke, C.J. was disgraced and summarily dismissed from his high office.

In 1701 the Act of Settlement established the foundation for the independence of the judges by enacting that they would thenceforth be appointed during good behaviour. This independence was perfected later when it was provided in England (as it is also in Canada) that judicial commissions would not terminate with the death of the Sovereign, and that salaries would be fixed by Parliament (see British North America Act, ss. 96 to 100).

Professor Lederman, in his landmark essay "The Independence of the Judiciary", Part III (1956), 34 C.B.R. 1139 says, at page 1160:

> "Even were there no other evidence, a mere reading of sections 96 to 100 of the B.N.A. Act discloses the intention to reproduce superior courts in the image of the English central royal courts."

[. . ./4] Berger, J. is the holder of a commission under the Great Seal of Canada appointing him one of Her Majesty's Judges for British Columbia "during good behaviour" (my underlining).

What is good behaviour?

The complaint against Berger, J. does not include an allegation of any failing by him in the discharge of his judicial office, or criminality, or

immorality or moral turpitude calculated to bring the Judiciary into disrepute in the minds of right-thinking members of society.

A leading authority on the Judiciary of England, and therefore of Canada, is Professor Shimon Shetreet of the Hebrew University of Jerusalem. I am indebted to Professor Shetreet for much of the authority quoted herein which is found in his brilliant book Judges on Trial (1976).

At pages 88-89 Professor Shetreet says:

> "At common law the grant of an office during good behaviour or, to use the Latin term, quam diu se bene gesserint [*sic*], creates an office for life determinable only by the death of the grantee or upon his breach of good behaviour. The grantee holds the office under the condition that 'he shall behave himself well in it', or, in Hawkins' words, that he shall 'execute it diligently and faithfully'. This condition applies by law whether or not it was expressly provided. Upon the breach [. . ./5] of this condition the grantor is entitled to terminate the office.
>
> Acts which constitute a breach of the good behaviour condition are those done in the exercise of official duties. Unjustifiable absence from duty, neglect of duty or refusal to perform the official duties form grounds for removal from office. It appears that at common law, mental infirmity does not constitute misbehaviour for which an office held during good behaviour may be terminated.
>
> Conviction involving moral turpitude for an offence of such a nature as would render the person unfit to exercise the office also amounts to misbehaviour which terminates the office, even though the offence was committed outside the line of duty. In Professor R.M. Jackson's opinion, at common law 'scandalous behaviour in [a] private capacity' also constituted breach of good behaviour. It is respectfully submitted that this statement, for which no authority is cited, cannot be sustained. It clearly appears from the authorities that except for criminal conviction no other acts outside the line of duty form grounds for removal from office held during good behaviour." (my underlining)

It has been suggested that a custom or convention exists which prohibits judges from making comments about "controversial" or "truly political" matters. I have some doubts about the force of customs; I note that the majority of the Supreme Court of Canada in Re Constitution of Canada (1982), 125 D.L.R. 1 at p. 22 denied that a "convention" may mature into a rule of law. I agree that it is customary for judges to refrain from making such statements, but I question, for the reasons that follow, that such a custom can be said to be anything more than that. [. . ./6]

Professor Shetreet (at pages 327-329) makes it clear that there is no uniformity of opinion on the question of what he calls "off the bench criticism of law and policy." I think it useful to quote from these pages as follows:

> "Not all the judges share Lord Parker's view that they 'cannot voice their views publicly either orally or in writing'. Lord Parker himself was prepared to criticise in public existing law and propose changes. In 1970, while Lord Chief Justice, Lord Parker, in a speech at the Lord Mayor's Banquet, unequivocally advocated the abrogation of the right of the suspect to remain silent, and described it as an anachronistic 'luxury'. In the same year Mr. Justice McKenna strenuously resisted the reforms proposed by Justice on the

interrogation of suspects. In the course of the discussion at the London meeting of the American Bar Association in 1971 and in an interview in The Times in 1972, Lord Widgery, C.J., like his predecessor, was also hostile to the right of silence, and advocated a more effective police interrogation inevitably resulting in less protection of the suspects' rights. At the 1971 London meeting of the ABA, other judges also expressed their views on the law in other areas.

In 1970, in his Riddell lecture, Lord Simon, then Sir Jocelyn Simon, President of the Probate Division, publicly offered critical comments on the Divorce Reform Act 1969. One critic wrote that this lecture was a 'questionable illustration' of judicial criticism of existing law. Simon was 'critical of the Divorce Reform Act 1969, even before the new regime had begun, yet after the statute had been subject to a protracted and heated public debate before it ultimately received parliamentary sanction. And this was the judge most directly concerned with the implementation and direction of the new policy in the courts'. [. . ./7]

Speaking in 1968 at the annual dinner of the High Court Journalists Association, Lord Justice Danckwerts charged that 'Parliament for generations now has defeated the best endeavours of the Courts'. He deplored the diversion from the courts of their jurisdiction over matters affecting the individual and entrusting 'some Minister or — some bloody-minded civil servant' to make an irrevocable decision on the matter.

Delivering the Hamlyn Lectures in 1974, Lord Justice Scarman called for an entrenched bill of rights detailing individual liberties, and a supreme court with power to overturn any 'oppressive and discriminatory statute'. Scarman's lectures aroused great interest in professional circles as well as in the general public. Such a forceful appeal for a radical constitutional reform is unusual when advanced so strongly and in such great detail by a judge.

. . .

Lord Hewart and Lord Goddard came under criticism for going too far in criticising law and policy off the bench. Lord Hewart's The New Despotism was not generally accepted as appropriate for a work by a judge when written in 1929, and its equivalent would certainly not be acceptable now. The Lord Chief Justice wrote and published that controversial book while in office. In it he attacked in the strongest terms administrative lawlessness and among other things, he indicted the civil service for an alleged deliberate and conscious conspiracy against the liberties of the citizen. One critic called The New Despotism 'a brilliant piece of journalistic propaganda'. Another critic observed that it was 'a work more remarkable for its uncompromising and trenchant style than its scholarship'. The Law Quarterly Review commented that The New Despotism 'furnishes one of the rare instances in which one of His Majesty's judges has written upon a controversial, although not a political subject'. . . . More recently, in the 1950s, Lord Goddard, C.J., came under fire for his passionate [. . ./8] and partisan campaign against the abolition of capital punishment."

Some of the colourful extra-judicial statements which Professor Shetreet quotes make it clear that judges have often spoken publicly about controversial or policy matters, and although some of them have been criticized, it has never been suggested that they should be disciplined. Professor Shetreet does not include any of Lord Denning's criticisms of trade unions, nor does he give any examples of Canadian judges or Canadian chief justices pronouncing orally or in writing on policy or controversial questions.

Quite recently Lord Scarman, having just sat on the dismissal of the application for leave to appeal brought by certain Alberta Indian Bands, did not hesitate to speak high praise for the proposed new Canadian Constitution in the ordinary business of the House of Lords. He called it ". . . a magnificent modern statement of human rights and freedoms — a magnificent contribution to the jurisprudence of human rights." Are comments on the Canadian Constitution permissible for English judges but prohibited for Canadian judges?

I question whether Berger, J.'s defence of Quebec's historic veto and his call for the performance of Canada's promises to our aboriginal people are as controversial as Lord Hewart, C.J.'s attack on government policy in The New Despotism or Lord Goddard, C.J.'s "passionate and partisan campaign against the abolition of capital punishment." [. . ./9]

Alternatively, if your Committee concludes that "off the bench pronouncements" may be grounds for removal, you will wish to consider whether Berger, J.'s comments are serious enough to warrant the ultimate judicial penalty given all the circumstances including, of course, the fact that he previously spoke out in favour of the constitutional package at the Canadian Bar Association Annual Meeting in September 1981 in the presence of many jurists, none of whom, so far as I am aware, suggested he had been guilty of misconduct, and the further fact that many members of Council at our meeting in Ottawa in March 1982 expressly stated that they did not think Berger, J. should be removed from office.

Procedure for Impeachment

Some well-established principles exist in England governing the removal process. It is instructive to consider these principles because they assist us to understand the background of the Canadian legislation which I shall mention in a moment.

In England, as in Canada, any member of Parliament may move a resolution for an address for the removal of a judge. It seems to have happened with considerable frequency in Great Britain, although only one judge (Sir Jonah Barrington in 1830) has actually been removed from office, and that was on an accusation of converting suitors' money in court to his own use. [. . ./10]

Professor Shetreet concludes at pages 105-107:

> "From the debates on motions for an address for removal there has emerged a clear principle, which was regarded by all Lords and Members as binding upon Parliament: that it is incumbent upon Parliament to protect the independence of the judiciary (my underlining). For this proposition one could refer to the voluminous debates in Parliament in every case which has been discussed. A few instructive illustrations will suffice. In the course of the debates in the case of Lord Ellenborough, C.J. (1816), the Solicitor-General said:

'The House on the one hand should watch with jealousy over the conduct of the judges, so on the other it should protect them while deserving protection not only as a debt of justice to the judges but as a debt due to justice herself, in order that the public confidence in the purity of the administration of our laws [would not be impaired].'

In the case of Lord Abinger C.B. (1843), Lord John Russell said:

'Independence of judges is so sacred that nothing but the most imperious necessity should induce the House to adopt a course that might weaken their standing or endanger their authority.' (my underlining)

Not only in the course of debates on motions for an address has this view been expressed. Almost in every debate on the administration of justice or on judicial salaries, statements to this effect may be found. One oft-quoted statement of Sir Winston Churchill is a good illustration of the degree of commitment of the British system to the principle of complete independence of the judiciary:

'The complete independence of the Judiciary... is the foundation of many things in our island life... It is perhaps one of the deepest gulfs between us and [.../11] all forms of totalitarian rule... The British Judiciary with its tradition and record is one of the greatest living assets of our race and people and the independence of the Judiciary is part of our message to the ever-growing world which is rising so swiftly around us.' (my underlining)

...

The principles and rules regarding the procedure and standard for removal have not been regarded as mere internal rules of Parliamentary procedure but as constitutional principles, emanating from the fundamental principle of the independence of judges. Thus, discussing the grounds for an address, Mr. Denman (later Lord Chief Justice) said that it 'had now become a constitutional principle that no judge should be removed from his situation unless a clear charge of malversation could be made out against him', and Lord John Russell stated that 'it was a principle of the constitution that judges should only be removable for partial and improper conduct'. In another case Prime Minister Ramsay MacDonald said; 'However unfortunate the words have been, they clearly do not constitute the kind of fault amounting to a moral delinquency which constitutionally justifies an address'.

... Mr. MacNeil argued in Mr. Justice Grantham's Case (1906) that 'it had been held to be in accordance with constitutional practice that such procedure [for address] should not be instituted unless the prima facie case against the judge was so strong as to justify an address' and in the same case the Attorney-General thought the prima facie case 'was the first constitutional step' for proceedings for an address."

It follows, in my view, that in Great Britain, and presumably in Canada, a motion in Parliament for an address should not be made, and debate would not be permitted, unless [.../12] there is a prima facie case of a breach of the condition of good behaviour justifying removal. By constitutional convention no member should move a motion for an address or vote that it be referred to committee for investigation unless satisfied that a prima facie case exists establishing a breach of the condition of good behaviour.

Does it not follow that if no prima facie case exists which would justify a recommendation that Berger, J. be removed from office that nothing further should be done in this case unless the Canadian Judicial Council has a valid superintendence over the extra-judicial conduct of judges pursuant to Canadian legislation?

The Canadian Legislation

It would seem that in Great Britain there is no disciplinary machinery in place short of a motion for an address in Parliament. There are informal checks against conduct outside the performance of judicial office such as pressure arising from discussions with the Lord Chancellor or Chief Justices and colleagues on the bench and from friends in the profession. These also exist in Canada, and have already played their role in this case as Berger, J. disengaged himself from the constitutional debate as soon as I spoke to him. [. . ./13]

But if the Canadian Judicial Council has a general superintendence over the conduct of judges, particularly with respect to conduct outside the performance of judicial office, then it follows that judges in Canada are substantially less independent than their judicial colleagues in Great Britain. I wonder if this is so.

In this connection I have examined the Chairman's Report to the Judges for the past 3 years. All of the complaints described in the Reports relate to matters that occurred in the course of discharging judicial functions or involved criminality or serious immorality. Council declined jurisdiction in a complaint arising out of a judge's alleged insolvency. It therefore appears that, up to now, Council has not purported to exercise any disciplinary jurisdiction over judges in a matter such as this, i.e. conduct of a judge not associated with the discharge of his office, and not amounting to criminality or moral turpitude.

Before I discuss sections 40 and 41 of the Judges Act, I think it useful to mention that in Great Britain, a motion in Parliament for an address for removal is generally preceded by a motion for an inquiry into the conduct of a judge. Alternatively, a motion for an address may be referred by the House to a Select Committee or to a committee of the whole House for investigation. Professor Shetreet at pages 132-133 says: [. . ./14]

> "If the House decides to refer the case for further inquiry, it may refer it to a Select Committee or to a committee of the whole House. The Select Committee investigates the alleged misconduct, gathers evidence and hears witnesses, including the accused judge. Upon completing its work, the committee reports its recommendation and this is discussed in the House, sitting as a committee of the whole House. Alternatively, the House may refer the matter directly to a committee of the whole House thus omitting the stage of a Select Committee. The committee of the whole House is confined to the taking of evidence which may be reported without any declaration of opinion, this being reserved to the House. Otherwise, and this has been the course followed in most cases, the committee of the whole House hears evidence and arguments and decides what further steps are to be taken in the matter."

At page 135, Professor Shetreet says:

> "...So anxious has Parliament been to protect the judiciary from unnecessary exposure to public indignity that it has been willing to qualify the constitutional right of aggrieved individuals to lay their grievances before Parliament. Parliament twice refused to entertain petitions against judges. Earl Russell and Mr. Denman, who brought up the petitions, believing that 'if a petition is couched in respectful terms to the House, no Member ought to refuse to present it', were criticised in the House of Lords and House of Commons respectively for failing to exercise their discretion and decline to present the petition." (my underlining)

The only Canadian precedent is the Landreville case where, in late 1966, a Special Joint Committee of the Senate [.../15] and House of Commons was appointed to enquire into and report on "...the expediency of presenting an address...for the removal of Mr. Justice Leo Landreville...." This followed an investigation into that judge's conduct by the Honourable Ivan C. Rand as a Commissioner under the Inquiries Act in which, inter alia, he found that the judge had committed perjury (see Landreville v. The Queen, [1972] 2 F.C. 726 at p. 757). Landreville, J. then resigned.

I have read the debates in Parliament and in the Standing Committee on Justice and Legal Affairs relating to the establishment of the Canadian Judicial Council. These debates are replete with references to the Landreville case, and it appears to me that one of the reasons for the creation of the Canadian Judicial Council was to provide a machinery for the inquiry phase of the removal procedure.

In addition to the inquiry process Parliament gave other responsibilities to Council, i.e. the management of judicial seminars, etc. and the jurisdiction under sections 40 and 41, whatever that may be.

The jurisdiction of Council to discipline a judge for conduct outside the performance of his duties, if any, obviously involves the independence of individual judges. [.../16]

The debates in Parliament and in Committee are ambiguous. There are frequent references to the traditional independence of the Judiciary, and some mention of "disciplining" judges. These latter references were usually, if not entirely, made in the context of a judge not getting his judgments written or other judicial misbehaviour, and I cannot extract from these debates any indication that the honourable members or senators ever intended to confer upon Council any jurisdiction either to initiate proceedings upon a private complaint of non se bene gesserit, or to assert a disciplinary control over the personal conduct of a judge. Indeed, I wonder whether such a jurisdiction would be ultra vires as an attempt on the part of Parliament unilaterally to amend the B.N.A. Act by adversely affecting the constitutional independence of the Judiciary.

In this connection I note that Professor Lederman had grave doubts about the constitutional validity of the former s. 31 of the Judges Act as it provided for the removal of a judge by the Governor General in Council upon a determination, after inquiry, that he had become incapacitated or disabled from the due execution of his office (p. 1162). The reason for these doubts, of course, was the lack of Parliamentary participation in the removal process. Should Parliament not be involved in all disciplinary matters concerning judges because such discipline must affect their independence? [. . ./17]

These questions lead me to a consideration of s. 41 of the Judges Act. There is no doubt that, subject to the constitutional questions just mentioned, Parliament intended Council to entertain complaints against judges. On that basis Council is within its power in investigating complaints and, where necessary, in authorizing an inquiry. This is a useful function because it furnishes a sounding board for real or imagined grievances, but the receipt of a complaint does not affect the independence of a judge.

As I said at the meeting of Council, supported by Nemetz, C.J.B.C. and others, it is my view that, on authority, a judge should not be placed under formal investigation, nor should his authority, prestige and dignity be questioned without his consent unless there is a prima facie case for removal. In Landreville, the government obtained the judge's consent before it appointed an inquiry commissioner.

As R. MacGregor Dawson said in The Government of Canada (1954) at page 486:

> "The judge must be made independent of most of the restraints, checks and punishments which are usually called into play against other public officials. . ." (my underlining)

Nevertheless, Council decided to proceed with a formal investigation, and that is where the matter now stands. [. . ./18]

Professor Shetreet has suggested, on authority, that extra-judicial conduct is not grounds for removal, and I have suggested for your consideration that a prima facie case cannot be made out for a breach of the condition of good behaviour on the part of Berger, J. If that is so, your Committee will have to consider whether you should recommend that the complaint non se bene gesserit should be rejected and not further entertained.

If it should be rejected, what remains to be done? It would seem that there is nothing further to be done unless you conclude that Council does indeed have a power to discipline judges for conduct which does not breach the condition of good behaviour. That jurisdiction could only arise, if at all, under Council's general power to investigate a complaint under s. 40(2) or under s. 41(2) of the Judges Act even though Council does not propose to recommend removal.

Literally read, and apart from the question of ultra vires, s. 41(2) authorizes Council to reach a conclusion, after investigation, that a judge has become incapacitated or disabled from the due execution of his office by reason of misconduct. Does this only mean a breach of the condition of good behaviour, or something less? If it means the former then the Council may recommend that the judge be removed from office. If it means the latter then Council obviously cannot recommend removal. [. . ./19]

The same analysis applies to s. 41(2)(d). In connection with that section I wish to state as Berger, J.'s Chief Justice that there is ample work in my Court to keep him fully occupied, and I am sure I need not persuade the members of your Committee that the assignment of cases in my Court is solely my responsibility.

What then is Council to do if it cannot recommend removal? It has been suggested that Council has the power to issue a reprimand to a judge for conduct of which it disapproves but which does not amount to a breach of the condition of good behaviour. I ask rhetorically how is the conduct which justifies a reprimand (or perhaps the lesser included admonition) to be defined?

I perceive on the part of a majority of Council an attitude which reminds me of my days as a Bencher. No doubt most of the members of Council were Benchers at one time or another during their careers. In British Columbia, and I believe in other provinces, the Benchers are the guardians of the honour of the profession, and they have a responsibility to discipline lawyers for "professional misconduct" and for "conduct unbecoming a member of the profession." In British Columbia conduct unbecoming a member is whatever the Benchers say it is (Barristers & Solicitors Act, R.S.B.C. 1979, c. 26, s. 1). [. . ./20]

I suggest that your Committee is now engaged in quite a different exercise. Your task is to recommend to Council the proper construction of its jurisdiction, and also to protect the historic personal independence — not just of Berger, J. — but of all the superior court judges in Canada. They are not a profession. They are "primary autonomous officers of state in the judicial realm" (Lederman), or "independent guardians of the law" (an expression used by no less a person than the Queen herself when opening a new wing of the Law Courts in London in 1968).

Clearly there is no specific legislative authority for Council to issue reprimands, and I am troubled by the lack of any definition of misconduct not amounting to a breach of the condition of good behaviour. Surely misconduct cannot be whatever Council thinks it is. I suggest that your Committee give consideration to the question of whether the legislative scheme of ss. 41 and 42 is to serve the inquiry phase of the removal process but, short of that, to

leave the judge alone except, perhaps, for avuncular advice, because he cannot be expected to discharge his duties properly if he is reprimanded, or more seriously, if he is in danger of repeated reprimands for conduct not amounting to misconduct but which displeases a majority of the members of Council.

And what is the result if a judge refuses to accept a reprimand? Are we to have the unsightly spectacle of Council and the judge flinging a reprimand back and forth? [. . ./21]

I ask that you also give consideration to the following. What would the position be if a judge is reprimanded for something not amounting to a breach of the condition of good behaviour and he brings proceedings in an appropriate Court to quash the reprimand. I suggest, for your consideration, that he may succeed, for there is no specific power to issue a reprimand, and it is arguable that a judge is not subject to any formal discipline except removal from office. Surely he is not like the employees of a large corporation where dossiers are kept on all employees, with merits and demerits, commendations and reprimands all recorded for future use!

I also ask the Committee to consider whether this entire procedure is not fraught with danger for the independence of the Judiciary. Is it the role of Council to impose its will upon the conscience of a judge who went unnoticed when he spoke up for the constitutional package, but who, when he speaks critically of later developments in the process, feels the full weight of the judicial establishment coming down on him — possibly destroying his career — merely because one judge has made a formal complaint?

In addition, the assertion of an undefined disciplinary power is a highly questionable proposition. I am confident it would not be abused by the present members of Council, but is such a power not calculated to create such [. . ./22] uncertainty in the minds of judges that it might be harmful to the Judiciary. Would it be thought that Council might interject itself into the personal lives of judges, or into their religious or other beliefs? Would it be wrong, for example, for a judge to permit his name to be associated with Amnesty International, or Anti-Nuclear Proliferation, or even one side of the abortion issue? These are questions which must be answered only if Council chooses to assert this amorphous jurisdiction.

As I suggested at our meeting, Council is entering dangerous territory. I ask that your Committee give urgent consideration to these questions so that Council will have the benefit of your wise advise.

Lastly I wish to remind the Committee that several members of Council have suggested that Berger, J. has shown no evidence of regret or contrition, and that all this might have been avoided if he had apologized, or had adopted

a more conciliatory attitude to the complaint and to Council. I hope the Committee will put any such thoughts out of its mind. Coke, C.J. might have kept his office if he had knuckled under to the King but he had done no wrong and his judicial conscience required him to act as he did. I do not compare Berger, J. with Coke, C.J. as such an opportunity for greatness has not yet been thrust upon Berger, J. But he denies that the conduct complained of has anything to do with the [. . ./23] condition of good behaviour in his commission and, that being so, he disputes the jurisdiction of Council to discipline him.

Should an independent judge take any other position in the face of insulting allegations by the complainant that his conduct is worse than sleeping with a prostitute?

As Berger, J. does not recognize your jurisdiction to discipline him, he considers it demeaning to him as an independent judge to participate in your proceedings. I have therefore felt compelled to bring these matters to your attention so that whatever is decided will not be entirely ex parte. On this point however I also wish you to consider whether a private inquiry is the appropriate way to reach conclusions of such consequence to the Judiciary. There may be many other views abroad that should be considered before reaching a conclusion on such an important matter of public interest.

I enclose 3 extra copies of this letter so that you may send them on, if you wish, to the other members of your Committee, and to your counsel. I propose to give a copy to Berger, J. who has not yet seen what I have written.

I wish you well in your deliberations.

Yours very respectfully,
[signature — Chief Justice McEachern]
Chief Justice

APPENDIX "N"

[Letterhead of McCarthy & McCarthy]

March 12, 1982.

VIA BANKERS DISPATCH

PRIVATE AND CONFIDENTIAL

The Honourable Mr. Justice T.R. Berger,
The Law Courts,
800 Smithe Street,
VANCOUVER, B.C.
56Z 2E1.[*sic*]

Dear Mr. Justice Berger: Re: Canadian Judicial Council

I have been appointed as counsel for the Committee of Investigation designated by the Canadian Judicial Council to make an investigation under section 40 of the Judges Act into the complaint of The Honourable George Addy in letters dated November 18th and 19th, 1981, to Chief Justice Laskin concerning your conduct.

I have been instructed by The Honourable B.J. MacKinnon, Chairman of the Committee of Investigation, to inform you that the Committee will hear your representations with respect to the complaint of The Honourable George Addy in Vancouver on Saturday, March 27, 1982.

If you prefer to have the hearing in Edmonton the Committee will meet in Edmonton on Saturday, March 27th for the purpose of hearing your representations. Please let me know promptly whether you prefer the hearing in Edmonton. [. . ./2]

I am enclosing herewith copies of the following:

1. The Resolution of the Canadian Judicial Council dated March 8, 1982 signed by the Secretary.

2. Letter of November 18, 1981 from Mr. Justice Addy to Chief Justice Bora Laskin with the attached newspaper report headed "Berger blasts 'mean spirited' members".

3. Letter dated November 19, 1981 from Mr. Justice Addy to Chief Justice Laskin with two newspaper reports, the first headed "Steps that'll give Canada a fairer form of Constitution" and the second one headed "Trudeau's 'sale price' offer gets cold shoulder from Levesque".

4. Letter dated November 26, 1981 to you from Pierre Chamberland, Secretary of the Canadian Judicial Council.

5. Letter datcd November 16, 1981 from Pierre Chamberland to Chief Justice McEachren which I assume is misdated. One would expect it would be dated November 26, 1981.

6. Your letter of December 3, 1981 to Chief Justice Laskin with the enclosed newspaper photostat dated November 12, 1981 headed "The first Canadians are last".

7. A partial transcript of the Jack Webster programme dated November 24, 1981.

8. A copy of your speech to the Canadian Bar Association dated September 12, 1981.

The hearing by the Committee of Investigation is, of course, confidential and will, in accordance with the Resolution of the Canadian Judicial Council, be held in private. You will, of course, be entitled to be represented by counsel if you so desire.

Yours truly,
[signature — John J. Robinette]
John J. Robinette

JJR:MR
Encls.

APPENDIX "O"

[Letterhcad of The Hon. Mr Justice T.R. Berger]

CONFIDENTIAL 16th March, 1982.

Mr. John J. Robinette,
Messrs. McCarthy & McCarthy,
P.O. Box 48,
Toronto Dominion Bank Tower,
Toronto Dominion Centre,
TORONTO, Ontario, M5K 1E6.

Dear Mr. Robinette,

Thank you for your letter of March 12th.

Please feel free to hold the hearing at any time or at any place that is convenient to the members of the Inquiry Committee. I do not intend to be there. I made this clear to Chief Justice Laskin in my letter of March 2nd, 1981, and I explained my position to my colleagues in a memorandum I sent to them on March 15th.

I enclose copies of both documents.

Yours truly,
[signature — Mr Justice Berger]

cc: Chief Justice Bora Laskin
Chief Justice Allan McEachern

APPENDIX "P"

[Letterhead of McCarthy & McCarthy]

April 27, 1982.

BY HAND

PRIVATE AND CONFIDENTIAL

The Honourable B. J. MacKinnon,
Associate Chief Justice of Ontario,
Osgoode Hall,
TORONTO, Ontario.

Dear Chief Justice MacKinnon: Re: The Honourable Mr. Justice Berger

You have asked for my opinion with reference to three points raised by Chief Justice McEachern as follows:

1. Does the Canadian Judicial Council have the power to investigate the extra-judicial conduct of a Judge without his consent?

2. Must there first be a prima facie case for removal of a Judge from office before the Council or an Inquiry Committee appointed by the Council can commence an inquiry as to whether the Judge should be removed from office?

3. Does the Canadian Judicial Council have the power to reprimand or impose some lesser penalty than to recommend removal of a Judge?

I have no difficulty with the first question. Section 40(2) of the Judges Act confers a wide power on the Council to investigate any complaint or

allegation made in respect of a Judge of a Superior, District or County Court. Extra-judicial conduct by a Judge may seriously affect the [. . ./2] public's perception of the good sense and good judgment of the Judge or may seriously impair the Judge's appearance of impartiality in the conduct of his judicial duties. In other words extra-judicial conduct may very well affect the acceptable performance of the Judge's judicial duties, or, to use the language of section 41(2)(d) of the Act, extra-judicial conduct may place a Judge in a position incompatible with the due execution of his office. In my opinion the Canadian Judicial Council does have under section 40(2) of the Act the power to investigate the extra-judicial conduct of a Judge without his consent.

Similarly the second question does not cause any difficulty in my mind. Under section 40(2) the Council has a wide discretionary power to investigate any complaint or allegation with respect to a Judge and there is nothing in Part II of the Judges Act which suggests that the Council before conducting an inquiry or investigation must first determine whether or not there is a prima facie case from removal from office.

The third question causes me some concern. The powers of the Canadian Judicial Council with respect to what it is to do at the conclusion of its inquiry or investigation are contained in section 41 of the Act.

Section 41(1) provides that after an inquiry or investigation under section 40 has been completed the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister of Justice of Canada.

Section 41(2) provides that where in the opinion of the Council the Judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of his office by reason of, inter alia, having been placed, by his conduct or otherwise, in a position incompatible with the due execution of his office, the Council in its report to the Minister of Justice may recommend that the Judge be removed from office and that he cease to be paid any further salary. There is nothing in section 41 which empowers the Canadian Judicial Council to recommend to the Minister of Justice [. . ./3] any disciplinary act other than removal from office. It follows, in my opinion, therefore, that the Council has no power to recommend a formal reprimand of the Judge to the Minister of Justice.

However, one of the objects of the Canadian Judicial Council as stated in section 39(2) of the Act is to improve the quality of judicial services in Superior and County Courts. Under section 41(1) the Council is required to report its "conclusions" to the Minister of Justice. Having regard to the objects of the Canadian Judicial Council I do not think that a narrow interpretation should be given to the word "conclusions" in section 41(1). The word "conclusions" does not exclude an expression of Council's views as to

the conduct of a Judge. An opinion based on a finding of fact is just as much a conclusion as the finding of fact.

In my view in its report to the Minister of Justice the Council can not only state the facts but also express its concluded opinion as to the conduct of the Judge who is the subject of the inquiry even though the Council does not exercise its further power under section 41(2) to recommend that the Judge be removed from office. In the course of stating this opinion as to the conduct of the Judge, the Council can, of course, also express its reasons for not recommending that the Judge be removed from office.

As to the position of the Committee of Inquiry, the Judges Act does not in terms specify what the Inquiry Committee is to do at the conclusion of its inquiry but it would seem clear from the scheme of Part II that the investigating Committee is required to submit a report to the Council. If the Committee is of the view that a Judge should be removed from office the Committee is justified in expressing its view to the Council. Also if the Committee is of the view that a Judge ought not to be removed from office the Committee should so state in its report to the Council. In my opinion the Committee of Inquiry also has the same power as the Council has to express its opinion as to the conduct of the Judge.

Yours truly,
[signature — John J. Robinette]
John J. Robinette.

JJR:MR